IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6794 of 1992
WITH
CIVIL APPLICATION NO. 7369 of 2000
WITH
CIVIL APPLICATION NO. 7813 OF 1992

WITH

SPECIAL CIVIL APPLICATION NO. 6893 OF 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? except bracketed: portion

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : YES

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SPL C. A. NO. 6794/92, C.A.7369/2000
CONSUMER PROTECTION COUNCIL
Versus
A'BAD MUNI. CORPORATION

C.A. NO. 7813 OF 2000
GUJARAT CHAMBER OF COMMERCE & INDUSTRY
versus

CONSUMER PROTECTION COUNCIL

SPECIAL CIVIL APPLICATION NO. 6893 OF 1993
THE AHMEDABAD PREMISES USERS' ASSOCIATION & ORS
versus
A'BAD MUNI. CORPORATION

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Appearance:
SPL. C.A. NO. 6794/92, C.A. No.7369/2000
MR MIHIR THAKORE with MR DARSHAN M PARIKH for Petitioners
MR SN SHELAT Addl Advocate General with MR MG NAGARKAR for Respondent No. 1
MR DC DAVE for Respondent No. 2
MR DP JOSHI, ASST. GOVERNMENT PLEADER for Respondent No. 3
MR SB VAKIL, Amicus Curie
C.A. NO. 7813 OF 2000
MS. NANAVATY & NANAVATY for petitioner
MR. DM PARIKH for respondents 1,2
MR. AMIT PANCHAL, for respondents 3,4
MR. DP JOSHI, AGP for Govt.

SPL. C.A. NO. 6893 OF 1992
MR. S.I. NANAVATI with MR. D.S. NANAVATI for petitioners
MR. PRASHANT DESAI for Respondent

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CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 04/10/2000

C.A.V. COMMON JUDGEMENT (Per Patel, J. )

SPECIAL CIVIL APPLICATION NO. 6794 OF 1992.

#. The petitioner, Consumer Protection Council, which is registered under the provisions of the Societies Act 1860 and under the provisions of Bombay Public Trust Act, 1950 has moved this Court by filing this petition under Article 226 of the Constitution of India through its Chairman, who is a Chartered Accountant for claiming several reliefs.

1.1 The respondent No.1, Ahmedabad Municipal Corporation, (AMC, for brevity, hereinafter) is a Local Authority functioning under the provisions contained in the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the BPMC Act). Respondent No. 2 is Town Development Officer of the Western Zone of

AMC. The petitioner has joined the State of Gujarat through its Secretary, Urban Development, Gandhinagar. The petitioner has moved this Court seeking appropriate writ commanding the respondents No. 1,2 and 3 to enforce the building byelaws, Town Planning Scheme Regulations and the regulations enforcing the provisions of the Development plan and in particular with regard to the properties constructed on C.G. Road and all other areas of the Ahmedabad City in general.

1.2 The petitioner has also requested the Court to exercise the powers under section 24 of the Civil Procedure Code suo motu, to call for the suits from the City Civil Court at Ahmedabad, filed by owners / promoters / organizers / builders and occupiers of the premises situated on C.G. Road. The petitioner has annexed a list at Annexure 'A' with regard to certain properties and the proceedings filed by the occupiers which are pending in the City Civil Court at Ahmedabad. The petitioner has also requested the Court to direct the respondents No. 1 and 2 to provide complete list of all the litigations filed in the Court by the aforesaid categories of persons.

#. The petitioner has pointed out in the petition that in flagrant violation of the rules and regulations and byelaws framed under the Gujarat Town Planning and Urban Development Act (hereinafter referred to as Development Act) and building bye-laws framed under the BPMC Act, construction of buildings had been carried out, and permission is being granted for erection of buildings in violation of the provisions. It is contended by the petitioner that the respondents are silent spectators to the violation of law though they are the guardian and law enforcing agencies with respect to such law. Therefore, the petitioner Society, carrying on the activities of protecting the interest of the consumers and is recognised as a Consumer Association by the State of Gujarat, having locus standie to file this petition, has filed this petition. It is averred in the petition that under the BPMC Act as well as the Development Act, Rules, Regulations and the Byelaws framed, the City is divided for land use zones into Residential, Educational, City, Village, Industrial, Commercial etc. It is pointed out that C.G. Road, i.e. the road commencing from Stadium Cross Roads to Mahalakshmi Cross Road is specifically designated in the Development Plan in a residential zone, and for that purpose the petitioner has relied on the copy of the letter issued by Deputy Municipal Commissioner stating that CG Road and nearby areas, as per the Development Plan, are in residential zone, and

not in commercial zone. The said letter dated 8.7.1992 is at Annexure 'B'. That letter further makes it clear that as per the development plan, in the residential zone, permission can be granted only for construction of residential houses and nursing homes. However, it is not permissible to grant permission to construct offices in that area. In substance, it is specifically stated that it is a residential zone and permission can be granted for restricted uses only, i.e. residential and nursing homes.

#.1 The petitioner has sought reliance on Appendix A-1 USE ZONE TABLE which is annexed to the petition at Annexure 'C'. Reading the same it clearly appears that as C.G. Road falls under 'predominantly residential zone' the types of development for which the zone is primarily intended is for dwelling houses, flats, tenement buildings, chawls, public residential buildings such as boarding houses, hotels, residential clubs, hospitals, clinic, nursing homes, sanitoriums, schools, colleges and public assistance institutions (residential), technical educational institutions, public and semi-public recreation grounds, gymnasium, health centres, green belts, and place of public worship. It is averred in the petition that though the Corporation has not granted permission to any owner, organiser, promoter or builder permitting the construction and use of the premises for any purpose other than the purpose for which the premises in residential zone can be used, premises are being constructed and used for purposes other than residential. In some cases after the Building Use Permission (BU Permission, hereafter) and in some cases, even without the BU Permission, such use is made. The respondent No.1 -Municipal Commissioner- by letter dated 28.8.1992 was requested to take appropriate action in the matter. The said letter was delivered to Shri P.U. Asnani, Deputy Municipal Commissioner in his office on 29.8.1992. A copy of the letter dated 28.8.1992 is annexed to the petition at Annexure 'D'. It is contended before us that despite drawing attention of the municipal authorities, no one has bothered to initiate any concrete action to stop illegal construction and unauthorised use of the premises for commercial purpose in residential zones.

3.2 It is further averred in the petition [in paragraph 4] that from the newspaper reports, the petitioner came to now that Town Planning Committee of the Corporation was to move a resolution to regularise illegal construction made on the C.G. Road by charging a

nominal fee of Rs.600/- per sq. meter. The petitioner has further averred in the petition that even the respondents No. 1 and 2 appeared to be helpless in some cases as whenever they have issued notices, the occupants have filed suits and/or petitions in the Courts and have obtained interim relief against the Corporation. It is further averred in the petition that neither the Corporation nor the occupants are keen to proceed with the litigation. It was submitted that in view of this, the Rules, regulations and the building byelaws are not being enforced. It is averred in the petition that most of the buildings constructed are being put to commercial use though the permission for construction and BU permission have been obtained for residential including, shops, nursing homes, safe deposit vaults, medical centres and medical shops, etc. with parking and common amenities, having been excluded from FSI. It is further averred that the actual use to which the buildings are being put on the other hand are, offices, godowns, shops, kitchens, restaurants, stores, motor garages etc. In some of the cases, even B.U. Permission is not obtained and property is used for purposes other than for which it can be used in a residential zone. On the strength of the contents of Annexure 'A', it is pointed out that various statutory provisions are violated and properties are being used other than for which the permission has been obtained or could have been granted. It is specifically pointed out on the strength of Annexure 'A' that the area which have been specified for the purpose of parking in most of the cases, (the cellar and/or ground floor or hollow plinth) are not being used for parking, but are being used as shops, commercial offices etc. The resultant effect is that there is no parking facilities available in most of the buildings on the C.G. Road. The petitioner has specifically averred in the petition that the buildings have no compound wall at all, and is open on all the sides abutting to the C.G. Road and other byelanes. It is specifically averred that this is done to enable the owners and occupiers to park their vehicles partly in the compound and partly in the place meant for footpath and partly on the already congested C.G. Road. It is pointed out in the petition that this unique system has been adopted in view of the illegal use to which the parking place is being put. It is further averred that the petitioner has received several complaints, both oral as well as written, about no action being taken by the authorities and requesting to see that some action is taken so that the owners/occupiers of the buildings on the C.G. Road put the premises to use strictly as per the permission. The petitioner has placed on record some of the letters with a view to

substantiate its case.

3.3 The petitioner has further pointed out that the action of the respondents is violative of Article 14 of the Constitution of India and violative of the provisions of relevant laws namely the BPMC Act, Building Regulations and the Development Act. It is further contended that the inaction is clearly arbitrary and discriminatory against the citizens of Ahmedabad and for the benefit of the builders, which have a very strong lobby, both amongst the politicians as well as amongst the bureaucrats. It is pointed out to us that the Corporation is permitting use of the property for purposes other than residential to those persons who are able to pay the charges as demanded by the Corporation illegally, arbitrarily and without authority of law, and those persons who are unable to pay are compelled to put the property to the residential use.

[ #. On the aforesaid premises and others that are urged in the petition, the petitioner has prayed for various reliefs as under:

(A). The Honourable Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction and order and be pleased to:

(1). Command the respondents to forthwith take action against all builders, occupiers, organisers, promoters, societies, companies and associations etc. having any building or premises on the C.G. Road in particular and any other place in Ahmedabad in general to see that such builders, etc. use the premises in accordance with the building use permission granted to them and in accordance with the building bye-laws, T.P. Scheme regulations and the regulations regarding the development plan and in particular the regulations regarding the zoning (C.G. Road being residential zone) and if necessary evict the owners/occupiers from the premises and pull down the constructions as and where necessary;

(2). Command the respondents to strictly enforce all building bye-laws, T.P. Scheme regulations and regulations enforcing the provisions of the development plan while granting all future permissions with respect to all buildings in Ahmedabad and in particular on the

C.G. Road and be vigilant to enforce the aforesaid regulations and bye-laws even after building use permission is granted to them and to command them to provide such machinery before granting building use permission as the Hon'ble Court deems just and proper, so that the building or any portion thereof is not used for a purpose other than for which building use permission is obtained.

(3). command the respondents to furnish a complete list of all litigations pending against the Corporation with respect to all buildings on the C.G. Road to this Hon'ble Court.

(4). Permanently restrain the respondents from regularising either the illegal constructions or the illegal use of the buildings in question in any manner whatsoever.

(B). The Hon'ble Court in the exercise of its civil jurisdiction under sec. 24 of the Code of Civil Procedure, 1908, be pleased to suo motu call for all pending litigations in the City Civil Court, Ahmedabad as well as before this Hon'ble Court with respect to all buildings or any portions thereof on the C.G. Road in particular and the City of Ahmedabad in general and to proceed with the same and in particular vacate interim reliefs granted in any such proceedings;

(C). That pending the hearing and final disposal of this petition, the Hon'ble Court be pleased to grant the following interim reliefs:

(i). The respondents No. 1,2 and 3 be directed to forthwith take action against all occupiers, builders, societies, associations, companies, having buildings on the C.G. Road in particular and in Ahmedabad in general and to completely restrain such occupiers etc. to make any illegal use of any buildings or premises or any portion thereof contrary to the provisions of the Gujarat Town Planning and Urban Development Act and the Town Planning Scheme Regulations as well as regulations enforcing the provisions of development plan or contrary to the Bombay Provincial Municipal Corporations Act, 1949 or any rules framed thereunder, and if necessary evict the occupants/owners and as and where necessary, pull down the constructions;

(ii). To command the respondents No. 1 and 3 to forthwith furnish complete list of all pending litigations against the Ahmedabad Municipal Corporation in any Court with respect to any building or premises situated on the C.G. Road.

(iii). By any interim order, the Hon'ble Court be pleased to call for all the suits and other proceedings pending in any court, including this Hon'ble Court, in this Hon'ble Court and be pleased to vacate all interim reliefs granted in such suits and proceedings;

(iv). Direct the Municipal Corporation to forthwith enforce the bye-laws regarding parking and compound wall and command the respondent to forthwith see that all buildings on the C.G. Road comply with the bye-laws, regulations, regarding parking and for the said purpose, see that compound wall is constructed by all buildings on the C.G. Road;

(v). Direct that the Corporation before granting building use permission in future with respect to any building on the C.G. Road shall obtain an undertaking in favour of this Hon'ble Court from such builder as well as from every occupiers who is going to occupy any portion of the building stating in the said undertaking that the builder as well as the occupier shall not use the premises for any use other than the use for which permission has been granted with respect to the said premises or a portion thereof and a further undertaking that they shall while transferring the premises put in as a term and condition of transfer that the premises shall only be used by the purchaser only for the purpose for which permission has been obtained q and that the undertaking is already given to that effect to this Hon'ble Court and would be binding to such purchaser as a successor-in-title and further that the undertaking shall clarify that this undertaking is given by the occupier for himself and for all his successors-in-title.

(vi). Pending the hearing and final disposal of this petition restrain the respondents from regularising the illegal constructions or illegal use in any manner whatsoever. " ]

#. From the process, it transpires that notice was issued to the respondents and on behalf of the respondent Municipal Corporation, Deputy Municipal Commissioner, C.S. Sharma, on 12th October 1992 filed an affidavit stating that after the completion of the construction, when completion certificate is filed for B.U. Permission, the Municipal Corporation grant such permission only after having been satisfied that the construction is in accordance with the approved plans or revised plans approved by the AMC and as per the requirements of the zone in which the building is erected. It was further made clear in the affidavit in paragraph 4 that the tendency to change user of the premises from residential purpose to commercial purposes and modification of the construction, apart from on the C.G. Road, is also noticed in the City area. The Corporation came out with a case that there were some litigations pending in the Court and that is how the delay is caused. It is specifically stated that there is further delay caused when the builders or the tenants thereof created a rowdy scene against the Corporation Officials and also sometimes prevent such demolition. It is further stated that when steps are taken for demolition, a situation is created whereby the peace and tranquility in the said locality is also disturbed.

#. In paragraph 5 of the affidavit, it has been stated on oath as under:

"I assert and say that the Municipal Corporation is in any manner whatsoever not interested in regularising any building or user thereof which is contrary to the regulations framed by the Municipal Corporation. However, since the litigation is pending before the court of law and that there has been delay in implementing the process, it is proposed that the Corporation may levy suitable fine and take an undertaking from the occupants and/or the builders or owners thereof to demolish such unauthorised user within the time stipulated by the Municipal Commissioner. That proposal is now placed before the Town Planning Committee of the Municipal Corporation and it will be considered by the General Body. The proposal does not envisage regularisation as such. In view of the best efforts of the Corporation, if the erring individuals and/or owners of the property continue to have illegal user of the unauthorised construction, the Corporation is justified in getting penalty from such persons which would be

effective both as a deterrent as well as a revenue earning to the Corporation."

#. The Corporation has come out with a case that as mentioned in Annexure 'A' to the affidavit, in several buildings, unauthorised construction and change of user had been noticed. It is pointed out that on account of the litigation, the Corporation is not in a position to take action. It would be worthwhile to note that it is not clearly stated whether the Court has granted interim orders qua the entire property or a particular shop or flat only. It has been noticed during the hearing in some other matters that even if one person has approached the Court and obtained the stay, the Corporation kept silence with regard to others, and has not taken any action. It was the duty of the Corporation to place on record, true and correct facts. It may be that for minor irregularities, notice might have been given and the suit might have been filed. However, it does not mean that for major irregularities the Corporation was prevented from taking any action. Some details are conveyed orally, which we will refer at appropriate stage.

#. The Corporation has placed on record at Annexure 'B' a letter signed by Municipal Commissioner (Mr. P.K. Ghosh). Secretary to the Corporation was informed that as per the bye-laws, regulation etc., in a residential zone, permission is being granted for use of nursing home, banks etc. However, after obtaining permission the property is put to commercial use which is not permissible and the occupiers are continuing the use of the property under orders of the Court. Parking space is used for commercial purpose and, therefore, some penalty should be imposed. The letter is in detail and from that it appears that it was considered if in case if the occupier has commenced the use of the property which is not permissible then on payment of mesne profit at the rate of Rs.600/- per sq. mtr., to the Corporation, the use should be made permissible. However, by giving one month's notice such permission can be cancelled and the amount so deposited be refunded without any interest to the owner and in this behalf no claim writing should be obtained from the occupiers.

#. On 15th October 1992, it appears that M.S. Thakkar, Town Development Officer filed an affidavit before the Court placing on record the resolution passed on 9.12.1992 by the Town Planning Committee. It appears that the Town Planning Committee considered the letter of the Municipal Commissioner. From the resolution it transpires that that the Town Planning Committee also

observed to the effect that for stopping the use of illegal use, there are several reasons which are coming in the way of the department, and the department has certain limitations and, therefore, it takes longer time. (What those limitations are, is not pointed out). In the meanwhile, the persons who are committing the breach are transferring the property, as a result of which, the persons buying the property is put in difficult situation, and, therefore, it was considered absolutely necessary to take deposits to restrict the change of user. It was decided that if an undertaking is given by the persons using the property for purposes other than for which permission was granted to the effect that within a period of two years from passing the resolution they shall stop such use, and if an undertaking is given not to initiate any legal proceedings, then by taking a deposit of Rs.600/per sq. mtr., notice shall not be executed, i.e. notice for change of user will not be implemented. This resolution was to come into force after the Corporation (i.e. the General Body) approves the same.

##. It is required to be noted that the respondents have not placed before the Court any resolution passed by the General Body of the AMC giving approval to the resolution passed by the Town Planning Committee. Nothing is placed before us to indicate that the State Government has also accorded its sanction to this Resolution. It goes without saying that the resolution passed by the Town Planning Committee was only recommendatory in nature and it could have been put to force only after the same is approved by the general body of the Corporation and the development plan if modified in accordance with law.

##. It appears that after filing the affidavit, on 15th October 1992 the petition was amended. Questions were pointed out in the amendment as to what is the provision for penalties and relaxation, or whether any relaxation is permissible and under what circumstances it is permissible? It was pointed out by the learned counsel for the petitioner that by this illegal and unauthorised construction, FSI will be increased. He submitted that the Municipal Corporation has no power to regularise the illegal/unauthorised constructions made or change of user of such constructions dehors the provisions of the TP Scheme and the provisions of the BPMC Act. If such a permission is granted, it would be an absolute illegality and that will be for the benefit of few persons who have committed the breach of law and to the detriment of the Society. When the respondents have no such power to regularise even for a day as contended by the learned

counsel, it is out of question even to permit the use of the property for the period of two years, as suggested by the Corporation.

##. In reply to paragraph 8.A, the Municipal Corporation has filed an affidavit of M.S. Thakkar, Town Development Officer interalia stating that considering the letter of the Municipal Commissioner, the Town Planning Committee was of the view that the Corporation would be justified in asking the defaulters to comply with the requirement of the Regulations within a period of two years for which the defaulters should give necessary undertaking. It is further stated therein that the defaulters were required to undertake that the illegal user would be stopped within a period of two years and that they will not file any civil suit and that they will also deposit Rs.600/per sq. mtr. by way of security deposit. It is further stated that the resolution was passed having regard to the fact that the breach of the regulations was noticed on large scale and that some of the defaulters obtained stay from the City Civil Court and other courts. It is further pointed out that with the limited staff, it was not able to implement the notices of demolition forthwith. It is further pointed out that 1125 criminal cases were lodged for levying penalty before the Metropolitan Court. It is contended that since within the frame work of law it was not possible to check the illegal user, the members were of the opinion that a resolution would indirectly control the illegal user. It is further stated that a reasonable time of two years was given to the defaulters to change the illegal user, so that they may not complain before the court that they were put to undue hardship. The deponent on behalf of the Corporation pointed out that breach is committed in other parts of the city also. The deponent has denied that though the Corporation has allowed to use the property for a period of two years, the intentions of the Corporation are above board as alleged. On oath, the Corporation has denied that the Corporation is interested in condoning the illegal construction as alleged. It is after this affidavit was placed on record, the Division Bench (Coram: A.P. Ravani & Y.B. Bhatt, J.) passed the following order on 21st October 1992 :-

"Rule. Heard learned advocates appearing for the parties as regards interim relief. Having regard to the facts and circumstances of the case prima facie it appears that if the resolution Annexure G dated 12.10.1992 is allowed to be implemented, it would amount to enabling the people who can make deposit of money at the rate of Rs.600/- per

sq. mtr. to stay the operation and implementation of the law, and exposing the people, who cannot make such payment, to the consequence of law. Prima facie it appears that if such thing is permitted it would be discriminatory and unreasonable, and, therefore, violative of Article 14 of the Constitution of India. Hence operation and implementation of Resolution dated 12.10.1992, Annexure-G dated 12.10.92, is stayed. it is further directed that ad interim relief granted on September 29, 1992 is ordered to continue till further orders. It is clarified that pendency of this petition and the grant of interim relief will not be treated as a circumstance for not taking action in accordance with law, that is to say, it will be open to the Corporation to take action in respect of alleged unlawful constructions in accordance with law."

##. At the time of hearing the petition, petitioner came to know that the Corporation has passed a resolution after the aforesaid order was passed by the Division Bench. By that Resolution, the Administrator of the Corporation (Shri P.K. Ghosh), considering the letter of the Municipal Commissioner (Shri P.K. Ghosh) and clause 53 of the Development Regulation and the provisions contained in section 386 (2) of the BPMC Act resolved that if in a residential zone any property is being put to use other than for residential purpose and if such use is not causing inconvenience in the residential locality, then for such purpose as mentioned in the letter of the Municipal Commissioner, conditions may be imposed and the licence fee may be charged and for that purpose in the revised Development Plan such provision should be added. So far as the licence fee is concerned, in the resolution it was mentioned that if it was on the plots where construction could be made within the FSI 1, then at the rate of Rs.180/- per sq. mtr. of the plot or part thereof to be charged, and in the plot where permissible construction limit is more than one, Rs.270/- per sq. mtr. is to be charged per sq. mtr. for the plot area or part thereof. It appears that the Municipal Commissioner Mr. P.K. Ghosh at the relevant time on 23.5.1994 addressed a letter to the Secretary. The following aspects were conveyed.

There is a provision under Revised Development Regulation No. 53 whereby permission can be granted to make non-residential use in residential zone for the Government offices or

other definite institutions on showing definite reasons. Presently private ownership building after they are built are being purchased by Government or other organizations and considering this fact, it is not objectionable, if in private ownership or co-ownership plots non-residential use is permitted. This provisions will be put in its place at the time of revised plan and scheme variation. But it is absolutely necessary to satisfy the immediate needs of the people. The uses prescribed under the Regulations No. 53 which are not harmful in connection with residence, such uses must be controlled and regularised under the provisions of BPMC Act.

After quoting section 386 (2) of BPMC Act, the Commissioner addressed to the following effect:

It is recommended that under this section the Municipal Commissioner, in residential zone, can permit the non-residential use, which in ordinary circumstances is not causing inconvenience and such uses are approved by Regulation 53, for certain specified organizations. By giving certain facilities, by putting conditions and also, by charging primary licence fees, written permission should be given. The permission would be to the effect that where in the Residential Zone, there are facilities required by non-residential use in residential zone, then on payment of such fees, non-residential use will be permitted despite a permission of residential use. For this, the standard of fees should be kept as follows:

(1). On plots where construction can be made in the limitation of 'FSI' I, Rs.180/ per sq. mtr. of the plot or part thereof, and,

(2). In plots where permissible construction limit is FSI more than one Rs.270/- per sq. mtr. of the plot area or part thereof.

13.1 The Commissioner further stated that considering the aforesaid, an Administrative Resolution Under Section 386 of the BPMC Act and Development Regulation 53 be made for permitting non-residential use of plots of private or joint ownerships in Residential Zone after charging licence fees as above and after putting proper note.

13.2 Thus, it is clear that shelter of Regulation 53 was taken. It appears that in view of this, it was the definite intention of the author of the letter to permit the change of user by charging the fees as mentioned in the letter. Thus, what legislature only can do, has been done by the Municipal Commissioner. Even this Court would not be competent to permit the change of user looking to the various provisions, but by Administrators resolution it was decided to regularise. It has so happened in the instant case that after the Municipal Commissioner addressed the aforesaid letter, the same Municipal Commissioner became the Administrator as there was no elected wing in existence. As Administrator, the then Municipal Commissioner (P.K. Ghosh) took the decision by making a resolution which we have indicated hereinabove, was infact put into practice. This resolution was not published for wide publicity but was made known to special class only. Thus, three types of constructions came into existence by passing this resolution, namely, (1). Unauthorised constructions where AMC has collected money for permitting change of user pursuant to 1992 resolutions; (2). Constructions where AMC has collected 'conversion fees' or 'value added fee' pursuant to 1994 resolutions, and (3). properties constructed and used strictly in accordance with law.

It is in this background, this petition is required to be considered.

SPECIAL CIVIL APPLICATION NO. 6893 OF 1993.

##. It is required to be noted that Special Civil Application No. 6893 of 1993 has been filed by Ahmedabad Premises Users' Association. It is stated in this petition that some of the members of the Association have purchased the property either directly from the builders whereas some of them have purchased the property upon reselling. It is further stated that this writ petition is filed against the sudden and illegal demolition of the properties of the members of the petitioner-Association. The petitioners have prayed for issuance of a writ of mandamus or any other writ, order or direction permanently restraining the respondent authority from demolishing the properties of the members of the petitioner Association situated at C.G. Road. They have also prayed for ad-interim injunction restraining the respondent authority from demolishing the constructions of the members of the petitioner Association.

14.1 It is stated in paragraph 2 of the petition that

most of the members of the petitioner-Association are poor and are not aware about the complicated fabrics of the Act, Rules and Byelaws. Along with the petition list of 27 members of the petitioner No.1 Association is supplied. Reading the same it appears that the members are occupiers of different properties/buildings situated on the C.G. Road.

##. Along with the petition, the petitioners have produced (at pages 42-43) copy of a communication dated 4th August 1990 between the Law Officer, Advocates' Esttb., AMC and the Deputy Municipal Commissioner (UD). The communication is with regard to change or amendment in Development Regulations. Even the proposed change in Regulation No. 80(1) provides that no person shall use the open space kept as open marketing place, consolidated open space, common plot, place for parking purpose, place for community utility and place for skip floor for any other purpose without previous permission in writing of the Municipal Commissioner. Thus, even this makes it clear that the petitioners were aware that even in the proposed resolution, it was not possible to use certain part of the property for the purposes other than for which the plans were approved.

##. Learned advocate appearing for the petitioner Association has placed reliance on a decision of the Delhi High Court in C.W.P. No. 324 of 1993. The Division Bench in the aforesaid writ with regard to a situation where only the petitioner's premises was sealed whereas no such action was taken with regard to various unlicensed premises in residential and commercial areas in the same/other localities, observed that:

> "The M.C.D. must act uniformly and not in a discriminatory manner. The MCD should either seal all the premises in which commercial activity is being run without a licence or none of them should be sealed pending the re-appraisal of its policy. We, therefore, direct the MCD either to take steps & erect sealing of all the premises in which commercial activity is being run which is unlicensed within four weeks and if this is not done, the seals of the petitioner should be removed at the end of four weeks."

##. Thus, it appears that the petitioner was singled out, and, therefore, he moved the Court and the Court directed the Corporation by an interim order to act uniformly and that too pending the re-appraisal of its policy. The Court directed to seal all the premises. In

the instant case, nothing is pointed out or placed before the Court about a policy decision. On the contrary, it has been made clear by the learned Additional Advocate General that the Corporation is keen to see that the property is put to its use as per the plan.

##. Having heard the learned counsels and advocates appearing in both these petitions, we would like to dispose of both these petitions by this common judgment.

##. In Spl. C.A. No. 6893 of 1993, N.P. Kadia, Deputy Estate Officer (West Zone) of AMC filed an affidavit interalia pointing out that the petition filed by the Association deserves to be dismissed as having been vague. The deponent on behalf of the AMC pointed out that the question of demolition of any property depends upon the facts emerging in respect of the said property and on the question as to whether there is any violation of the provisions of law, rule, byelaws or development control regulation. It is further pointed out in the affidavit that the Association is formed and the present petition is filed by the persons who have illegally made construction and/or are in possession of the premises used contrary to the plans as approved by the Corporation. It is further pointed out in the affidavit that the builder and the purchaser knew full well and/or ought to have known that according to the development control regulation as well as building byelaws of the Corporation the said premises could only be put to such use as is permitted under the said byelaws. It is further pointed out in the affidavit with regard to the new buildings on C.G. Road that the same came into existence very recently, but some of the buildings are even in the process of being constructed. It is further stated in the affidavit that actions are being taken within a reasonable time after obtaining all necessary particulars against the illegal construction and/or illegal use of the construction. It is further pointed out that if the construction is illegal or unauthorised, the respondent Corporation has to exercise its statutory powers and duties. It is further pointed out that there is no question of any regularisation of any unauthorised construction and that there is no question of publishing of any such concession in gazette or newspapers as alleged. It is further stated that the authorities have to act only in accordance with law. It is further stated in the affidavit that the petition is filed by the 'enriched builder lobby'. It is further stated in the said affidavit that on 10th August 1988, a resolution being No.101 was passed by the Town Planning Committee of AMC and approved by the General Board of the

Corporation by Resolution No.404 dated 18th August 1989 and a proposal was made to the State Government that in respect of 'use zones table Appendix A/1 in column 5, 6 and 7, amendment may be made so as to permit the Corporation to give permission in respect of the use of the premises according to the zone table keeping in view the size of the road and the other developments which might have taken place around the premises in respect of which permission is sought. However, the said proposal sent to the Government was not approved by the State Government and by a letter dated 27.12.1990 it was informed to the Corporation that after the report is received from the Committee appointed for the purpose of framing model bye laws, the question will be considered and therefore it is not correct that there was any proposal to change the zone as alleged. Thus it is very clear that the property was to be used for the purpose for which it was mentioned in the zone.

##. It is required to be noted at this stage that so far as Floor Space Index (FSI, for brevity) is concerned, a petition was filed in this Court and the decision thereof was challenged by filing Letters Patent Appeal. The petitioner has referred to this L.P.A, especially in paragraph 4 of the petition. The petitioner has not placed on record the decision rendered in the L.P.A. However, the deponent, on behalf of the AMC has made it clear that there is no question of FSI being allowed for the commercial zone and there is no question of confusion for residential zone to the commercial zone as alleged. It is further stated in the affidavit that there is no question of permissible FSI which can be adjusted against the unauthorised constructions meant for parking place, common amenities etc.

##. It is required to be noted at this stage that the Corporation, by giving public advertisement on 19.7.1989, has pointed out that unauthorised constructions are carried out; Parking is required to be provided and for the purpose of parking permission is granted either in cellar or in hollow plinth. It has been brought to the notice of the public at large that in the place meant for parking or the hollow plinth by providing partition, shops are constructed. Similarly, in residential zone permission is granted for bank with safe deposit vault and nursing home and even in such cases also, by constructing walls, offices or shops are constructed which are being transferred by sale or other method. It was also brought to the notice of the public at large that the place permitted to be used as otta (ottla) is being covered and the thereby the size of the building

and FSI are increased. The public at large was informed that such activities were illegal and cannot be approved by the Corporation. Therefore, the public at large was warned before buying or hiring such properties to verify the legality of the permission granted. Thus, public at large was informed that they should make inquiry about the plans. It is also pointed out that if some private person is acting contrary to law, AMC or its officers cannot be held responsible. It was also mentioned in the advertisement that information can be provided by the Ward Inspector between 3.00 to 5.00 pm. on any working day. In the advertisement, the Corporation has also pointed out the details of certain buildings with survey numbers and names of the buildings and other particulars. This was done with a view to inform the public at large. This advertisement was given on 19.7.1989 in Gujarat Samachar and a xerox copy thereof is produced at Annexure 'I' to the affidavit in Spl. C.A. No. 6893/93. Thus, it is clear that the Corporation has conveyed information to the public at large about illegal constructions in various buildings. The Corporation has published another advertisement in Sandesh on 29.11.1991 conveying information to the public at large to the effect that the road which is known as C.G. Road which commences from Sardar Patel Stadium in the revised plan is in the residential zone; what types of constructions are permissible are also mentioned in the advertisement; The public at large was informed to verify the plans and only thereafter they should buy the property or take on rent. It is specifically mentioned that it is not in the interest to buy the property or to take such property on rent. Thus, from the tenor of the affidavit filed in the petition, it is very clear that the Corporation informed the public at large by giving public advertisement in newspapers that before buying the property or hiring the property, the public should verify the plans. The deponent pointed out that despite this, if property is purchased or hired, the Corporation should not be held responsible. Similar advertisement is given in another local daily, copy of which is placed along with the petition. Thus public at large was informed that properties on C.G. Road can be used for residence and nursing homes and cannot be used for commercial purposes.

[ DETAILS WITH REGARD TO SOME BUILDINGS.

##. Learned counsel Mr. P.G. Desai appearing for the Municipal Corporation placed before us a list of some of the properties situated on C.G. Road and other partes of the city, wherein there is unauthorised construction and gross contravention of the building regulations.

(i). In the building known as 'Trade Centre' permission was granted for construction of cellar for parking, ground floor for shops and nursing homes, skip floor was to be kept open and 1st to 8th floor for nursing homes. However, the premises is being used as kitchen, godowns, shops and offices. In view of this, notices were given under sec. 260 of the BPMC Act and also under sec. 478 of the BPMC Act. He submitted that soon after erection of building unauthorised construction was noticed, hence notices were given. It appears that different proceedings were initiated, viz. C.S. No.1420/89 and C.S. No. 5511/94. It is also informed that C.S. No.3005/91 and 2133/00 were also filed. In the later suits, it appears that one was withdrawn and in one suit, six months time was granted. It also appears that in earlier proceedings, injunction was obtained, and, therefore, the Corporation, according to Mr. Desai, was not able to take action.

(ii). As regards Karishma Complex, permission was granted to construct cellar for store, and ground floor to third floor for the purpose of residence. However, the property is being used for shops and not as per the plans. In this case also, C.S. No. 6086 of 1992 was filed and the plaintiff had obtained an injunction.

(iii) The property known as Kamal Complex was permitted to have cellar, ground floor, first floor and second floor. The cellar was for parking, ground floor for shops and 1st and 2nd floors for nursing homes. The entire building is used for shops and offices. Civil Suits were filed being C.S. No. 4523/89, 5617/90, 2361/90, and 2362/90. Injunction granted by the trial Court continues, and, therefore, the Corporation is unable to take any action.

(iv). In the property known as BK HOUSE, permission was granted for parking in cellar, and residence in ground floor to 3rd floor. However, cellar is being used as Stores, and the other floors are used as shops and offices. Suits being C.S. Nos.3284/95, 3174/95 and 4711 to 4714 of 1999 were filed. The trial Court has granted injunction against which appeal is preferred and is pending for admission in this Court.

(v). The property known as "OMKAR HOUSE" was permitted to have cellar, hollow plinth, ground floor to 2nd floor. Cellar was permitted for safe deposit vault, hollow plinth for parking, ground floor to 2nd floor for nursing home. However, instead of parking and nursing homes,

there are shops and offices in cellar, hollow plinth and all the floors. It appears that Civil Suit No. 1955/89 and 2853/89 were filed and the suits are pending, and on account of injunction, the Corporation is not in a position to take any action.

(vi). In the building known as 'CHANDAN', cellar was permitted to be used as safe deposit vault, and parking, ground floor for Bank, 1st floor and 2nd floor for nursing homes. However, it is not being used for the purpose for which permission was sought and instead, there are shops and offices. Civil Suit No. 4289/90, 3031/90 to 3034/90, 3074/90 to 3081/90 were filed and in view of the injunction granted by the trial Court, the Corporation is not in a position to take any action.

(v). In the building known as Bhagwati Chambers, permission was granted for parking in cellar, shops and nursing homes in ground floor, and nursing homes on 1st and 2nd floor. However, instead of the purpose for which permission was sought, the whole building is used for shops and offices. Civil Suit No. 1407/88 was filed and in view of the injunction granted by the trial Court, the Corporation is not in a position to take any action.

(vi). In the property known as City Centre, permission was granted to construct cellar for store and parking, ground floor for residence and common amenities, 1st to 10th floors for residence. However, only some part of the cellar is used as parking but the remaining part of cellar and the remaining entire property is not being used for the purpose for which permission was granted. The trial Court, in C.S. No. 3012/92 and 347/93 has granted injunction and the Corporation is not in a position to take action.

(vii) In SURYODAYA COMPLEX, permission was granted for parking in cellar, shops and stores on ground floor, residence in 1st to 3rd floor. However, the property is not being used for the purpose for which permission was granted, but is being used for offices, shops and stores. Civil Suit No. 171 of 1993 and 4678/96 had been preferred and it transpires that the trial Court has passed the order and allowed the Notice of Motion. The defendant was restrained from demolishing the construction. It is clarified by the trial Court that it will be open for the Corporation to issue fresh notice under section 260. Mr. Desai is not in a position to state whether fresh notice has been issued or not in this matter.

(viii) In AMAR Complex, permission was granted for parking in cellar, shops and nursing homes in ground floor, and nursing homes in 1st and 2nd floor. However, it is not being used for which the permission was granted and the entire building is used for shops and offices. Civil Suit No. 2096/90 was filed and the trial Court has restrained the Corporation from taking any action.

(ix). In SHILP building, permission was granted to construct cellar for parking, ground floor for shops, 1st to 6th floors for nursing homes. However, only part of the cellar is used for parking and there are shops in the cellar. The remaining floors are not being used for the purpose for which permission was granted. The trial Court granted stay in C.S. No. 1605 of 1992, and, therefore, the Corporation is not in a position to take action.

(x). In AGARWAL AVENUE, AMC granted permission to construct cellar for parking, ground floor for Bank. Details of permission for the remaining floors are not readily available with Mr. Desai. However, it is stated by Mr. Desai that on the terrace additional floor is constructed and and by constructing RCC slabs inbetween 3rd floor and 4th floor, an additional floor is constructed. Eight Shops are constructed in the cellar and thereby cellar is not kept open for parking. Thus, there is unauthorised construction and change of user which are not permissible. However, in view of injunction granted by the trial Court in C.S. No. 1907/96, Mr. Desai submitted that it is not possible for the Corporation to take any further action.

(xi). In SWAGAT, permission for parking was granted in cellar, nursing home and shops in ground floor, and nursing homes in 1st to 9th floors. However, part of the cellar is being used as parking and in the remaining part, there is unauthorised construction by converting it into shops. There is no nursing home in ground floor and from 1st to 9th floor, shops and offices are constructed. Civil Suit No. 2190 of 1993 is filed and in view of the interim order passed against the Corporation, the Corporation cannot take any further action.

(xii) In RATNAM building, permission was granted for cellar for parking, ground floor for shops and nursing home, 1st and 2nd floors for nursing homes. However, there are shops in the cellar and the entire premises is used for commercial purposes and offices. There are no nursing homes. the trial Court has granted injunction in C.S. No. 1070 of 1992 and therefore, the Corporation is

not in a position to take action.

(xiii) In AROHI building, AMC granted permission to construct cellar for parking, hollow plinth for parking, ground floor to 3rd floor for residence. However, in the hollow plinth, there are shops instead of parking, and on ground floor to 3rd floor, the construction is being used for shops and offices. The trial Court has granted injunction in Civil Suit No. 6122 of 1998, and, therefore, the Corporation is not in a position to take any action.

(xiv) In Kalpana Complex at Memnagar, AMC granted permission to construct cellar for parking and common amenities, ground floor for shops and stalls, first floor for office and residence, and 2nd to 5th floors for residence. However, in the cellar there are shops as also in the ground floor. 1st floor to 5th floor are being used as office unauthorisedly by making unauthorised construction. No suit is pending. It is also stated that the builder has constructed three additional floors without any permission from the Corporation. Yet no action seems to have been taken in this matter by the AMC.

(xv) In the adjoining building known as PEOPLE PLAZA, permission was granted for common amenities, store and parking in the cellar, hollow plinth for parking, ground floor for shops and store, 1st floor for office and residence, 2nd to 5th floor for residence. However, in the cellar, instead of common amenities and parking and stores, shops have been constructed. Hollow Plinth is used for parking place. Ground floor is used for residence and shops. In this case also, three additional floors are constructed without any permission from the Corporation. No proceedings are pending in the Court and yet no action is being taken by the Corporation.

(xvi) In SUPATH building, cellar was permitted for common amenities and store, hollow plinth for parking, ground floor for shops and stores, 1st to 9 floors for residence. In the cellar, instead of common amenities and store, there is a departmental store. There is no store in the ground floor. No proceedings are pending, and yet, there appears to be no action taken by the Corporation.

(xvii) In the building known as WHITE HOUSE, Corporation granted permission for parking and medical store in cellar, on ground floor shops and medical stores, on 1st to 8th floors for nursing homes. However, there are

shops in the cellar and ground floor and there are offices in 1st to 8th floors. Several civil suits were filed but the numbers are not required to be stated as Mr Desai submitted that as on today, no suit is pending in the trial Court. Inspite, there is no explanation from the Corporation as to why action is not taken in this matter.

(xviii) In the building known as ASHISH, permission was granted to construct cellar for parking, ground floor for shops, and 1st to 3rd floors for nursing homes. Mr. Desai submitted that by removing unauthorised constructions in the cellar, the same was made open for parking. As regards the change of user and unauthorised construction of the remaining floors, it seems that no action has been taken by the Corporation.

(xix) In OM Complex, permission was granted for parking and safe deposit vault in cellar, ground floor for bank, 1st to 3rd floor for nursing home. However, instead of the facilities for which permission was sought, the property is being used as store, shops and offices. Civil Suit No. 1216/91 was filed. However, no suit is pending as on today, and there is no explanation why the Corporation is not taking any action.

(xx) In the building known as Sun Complex, , plans were approved for construction of cellar, ground floor, 1st and 2nd floors. The cellar was for parking, ground floor for shops, and 1st floor and above for nursing homes. However, the entire building is used for shops and offices. It appears that a suit being C.S. No. 1655/96 was filed, the same has been dismissed. No action has been taken in the subject matter till this date.

(xxi) In the property known as Ambalal Complex permission was granted for cellar, ground floor, first floor to 3rd floor. Cellar was for parking, ground floor for shops and 1st to 3rd floor for nursing home. However, cellar is not used for parking place. The premises is being used for commercial purposes, viz. shops and offices. No suit is pending and there is no injunction. However, no action has been taken by the Corporation.

The above instances are only illustrative and not exhaustive. ]

##. Mr. Desai submitted that out of the above cases, in most of the cases soon after the unauthorised

construction or illegal use was noticed by the AMC, actions were initiated by the Corporation by issuing notices, and after following the procedure, actions as required under the BPMC Act were to be taken for removal of unauthorised construction. However, soon after issuance of notice, the builder or occupier and or Associations have approached the trial Court and the Courts below have granted injunction, and, therefore, further action could not be taken by the Corporation. Mr. Desai assured the Court that where there is no injunction granted by the Courts, the Corporation shall take action immediately and shall report the action taken to this Court within a period of four weeks from today. We would also like to state here that such action of the Corporation should not be restricted only to the aforesaid handful of cases but the Corporation must take action in accordance with the law wherever it is found that buildings are used in contravention of the permission granted.

##. Thus, it appears that playing fraud on the statute, the builders are erecting buildings contrary to the permission granted by the Corporation and the occupiers are putting it to use other than for which the permission is granted. It is also found that persons have approached different Courts and have obtained injunction / stay orders from the Courts, and the Corporation has not taken any concrete steps to see to it that the stay orders are vacated, or suit/applications are heard on priority basis. On the contrary, it is found that in certain cases, though stay is obtained by only one occupier, no action is taken for the the remaining part of the building. What is the nature of interim order is also not stated. Before this Court, while hearing one matter, it was noticed that the trial Court directed to maintain "status quo" and not to construct further; yet it appears that in breach of order, construction was completed and property was put to use.

##. Later on, in Spl. C.A. No. 6794/92, on behalf of the Corporation, affidavit is filed on 31st August 2000 by Shri K. Kailasnathan, I.A.S, Municipal Commissioner. He has gone through the petition as well as the amended petition and has also perused the records relating to the subject matter and tendered unconditional apology for passing the impugned resolution dated 17.9.1994. He has stated that the entire C.G. Road is designated as residential zone and has frankly stated that the Corporation was not able to take timely measure when the building units in the residential zone were put to use

for commercial purpose. He has further stated that the Development Plan was sanctioned at the instance of the Ahmedabad Municipal Corporation on 12.8.1983 and a Revised Development Plan was to be proposed by the Ahmedabad Urban Development Authority (AUDA); That the State Government had also sanctioned by notification dated 2.11.1987 the Development Plan covering the area within the municipal limits at the instance of AUDA. It is further stated in the affidavit that it was bonafide believed that since ten years period was to expire on 11.8.1993, and development plan was to be revised under the provisions of Section 21 of the Act, the contents of the impugned resolution can be incorporated by the State Government while revising the Development Plan. It is further contended in the affidavit that in view of the decision of the Supreme Court in AIR 1996 SC 204 that the Development Plan as sanctioned on 12.8.1983 merged and became part and parcel of the Development Plan sanctioned on 2.11.1987. It is further stated in the affidavit that in accordance with the judgment of the Supreme Court, the Revised Development plan has been submitted for sanction by AUDA; It has also been requested to incorporate the contents of the resolution in the Revised Development Plan. The said Development Plan is pending with the Government for final approval.

##. We are not expressing any opinion about the legality or otherwise as to whether a Revised Development Plan can be submitted, and if permissible whether by AUDA or by AMC considering the provisions contained Chapter IX -A of the Constitution of India. It appears that the Resolution passed by the Administrator, as stated by the present Municipal Commissioner, can be acted upon with the permission of the Competent Authority, and the commercial use can be permitted subject to the compliance of conditions by payment of value added charges. It is further stated that while granting the change of use, it has been insisted that all the conditions for erection of a building including parking, shall have to be complied with by the building units required for commercial use. The Municipal Commissioner has fairly admitted that the revised development plan is still not sanctioned, as on 31st August 2000. It is stated by the Municipal Commissioner as under:

"The present resolution of 17.11.1994 was passed by the Administrator for proposing necessary amendment in the Development Control Regulation. I submit that the Revised Development Plan has still not been sanctioned as on today. I submit that it was an error on the part of the

Corporation to implement the resolution in the meanwhile. It was bonafide believed that in a short time the contents of the resolution in Development Plan would be incorporated. However, that has not happened. I, therefore, tender my apology to the Honourable Court".

##. Before us, learned Additional Advocate General appearing for the Municipal Corporation fairly stated that as the law stands today, properties situated on the C.G. Road cannot be used for any other purpose than the usage permissible in a predominantly residential zone as mentioned in Schedule A.1 which we have already referred to hereinabove. In short, it was stated that the property cannot be put to any commercial use.

##. Shri P.K. Ghosh, the then Municipal Commissioner has also filed an affidavit before us interalia stating that he bonafide believed that in the proposed Development Plan, contents of the resolution would be incorporated and that the said resolution would then have the sanction of law. In his affidavit it is further stated that the revised development plan is still not approved by the Government and there was an error on the part of the Corporation to implement the resolution in the meanwhile. In fact, it was a proposal which was to be incorporated in the proposed revised development plan, and therefore, there was no question of implementing the resolution. However, it appears that the Corporation, ignoring the provisions of law started collecting the amount unauthorisedly, illegally and without authority of law, and permitted the builders to construct multi storeyed buildings on C.G. Road, and other places in the City of Ahmedabad, even in residential zones for use as commercial complexes, shopping complexes etc. which is not permissible under law.

##. It is required to be made clear first the apparent mistake on the part of the respondent in invoking section 386 of the BPMC Act. Chapter XXII pertains to licences and permits. Licences to Architects, Engineers or structural designers, plumbers, clerks of works etc. are found in section 372 of the BPMC Act. Trade licence and other licences for keeping animals and certain articles are found in section 376 of the Act. Section 377 refers to prohibition of sale in municipal market without licence of Commissioner. Section 378 provides that private markets shall not be kept open without licence. Sub-section (2) of section 386 of the BPMC Act reads as under :-

"Except as may otherwise be provided by or under this Act, for every such licence or written permission a fee may be charged at such rate as shall from time to time be fixed by the Commissioner, with the sanction of the Corporation".

##. Thus, it appears that taking shelter of this provision, permission to use the property for commercial purposes in a residential zone has been given. The provisions of this section could not have been invoked in the instant case. As it has been fairly stated by the learned counsel appearing for the Corporation that this section could not have been invoked, we do not wish to deal with this issue any further.

##. Mr. Mihir Thakore, Senior Advocate appearing for the petitioner in Spl. C.A. No. 6794/1992 made a grievance that the Municipal Commissioner / Municipal Corporation, in the instant case, has acted in such a way that their act cannot be condoned; They could never be pardoned; They have collected money from the public without sanction of law and that too, to permit an unauthorised and illegal use of property in a zone where such use is impermissible, more particularly by overreaching the stay granted by this Court. He submitted that they have committed breach of Article 14 and 21 of the Constitution. He further submitted that keeping aside the provisions contained in the Act and the Development Act, the Municipal Corporation has acted arbitrarily, illegally and contrary to the provisions of law. He drew our attention to section 19 of the Development Act with regard to variation of final development plan. If there is a proposal from the Area Development Authority for variation of the final development plan and the Government is of the opinion that it is necessary and in the public interest to make any variation in the final development plan, then the Government has to publish the same in the official gazette pointing out the variations proposed in the final development plan, amendment if any in the regulation and the approximate cost, if any involved in acquisition of land which, by virtue of this variation would be reserved for a public purpose. There will be notice inviting suggestions or objections in respect to the variation within the time prescribed from the date of publication of the notice and it is after considering the suggestions and the objections received under sub-section (1) within the period specified therein and after consulting the Area Development Authority only, the State may by notification sanction the variation with or without

modifications as it may consider fit to do and such variation shall come into force on such date as may be specified in the notification. Learned counsel Mr. Thakore submitted that even in case of variation, objections are required to be invited; not only that, but if the persons who are likely to be affected by such variation i.e. who have incurred any expenditure in complying with the final development plan as it existed before such variation, such person shall be entitled to receive compensation. He submitted that in a residential zone, if persons have constructed residential houses for residential purposes, and if in the adjoining property or in the same building, persons are permitted to use the building for purposes other than which is permissible, it would cause lot of inconvenience and nuisance to the other occupiers using the property for residence. The legislature, keeping in mind the interest of the public at large, has made these provisions. That cannot be brushed aside by arbitrarily collecting money from the builders / occupiers / owners etc. who are able to pay and permission cannot be granted for commercial purposes in a residential zone in an arbitrary and illegal manner. It is submitted that the persons who are using a property in a residential locality would be entitled to get compensation if variations are to be made in the development plan. Such persons who are adversely affected are also required to be heard. Whether a person is entitled to get compensation, and if entitled to what extent, would all depend upon facts and circumstances of each case. Mr. Mihir Thakore vehemently submitted that without hearing the people at large, such permission cannot be granted. The zoning system was the laudable object of the Act, and the Administrator or the Town Planning Committee could not have passed resolutions which would directly contravene the provisions of law.

##. Learned Additional Advocate General has placed before us the file pertaining to unauthorised construction and for levying of penalty. It transpires that on 29th July 1992 a letter was addressed to the Municipal Commissioner by Chairman of the Standing Committee drawing his attention that as per the bye-laws, in a residential zone, permission is granted for construction of nursing home and bank building. Persons to whom such permission was granted, instead of using as nursing homes, have made use of the building for commercial purposes and under the interim orders of the Court, they continue to use as a result of which commercial centres have come up in residential zones. It is also pointed out that parking place is also used for commercial purposes and the Corporation is not in a

position to stop the same. Therefore, in such a situation, it was suggested that penalty should be levied. The author has further pointed out that in residential zone, merely by observing that commercial centres have come up, there will be no solution and for restriction certain steps must be taken. It appears that thereafter Central Office prepared a report wherein there is a reference to the letter referred to hereinabove. It was suggested in the letter that by committing breach of law or byelaws, if there is economic gain, then in such a case, against such persons, it is essential to consider about the imposition of penalty. Despite the provisions of law, the legal procedure takes some time, and time is lost in litigation. The persons engaged in business are also keeping in mind the amount to be spent. That aspect is stated in detail and we do not refer to it in detail, but suffice it to say that it was suggested that if before the resolution on any previous date if there is change of user (in contravention of the use) then for such use, per sq. mtr. Rs.600/- per sq. mtr. should be paid by mense profit to the Corporation. And in such a case, the Municipal Commissioner may allow such use and permission can be cancelled by giving one month's notice. The amount of Rs.600/- appears to be inserted subsequently as it is in different ink and different handwriting. The said letter appears to have been addressed by Deputy Municipal Commissioner. On the basis of these notes, a letter was addressed to the Municipal Secretary on 5.9.1992. Manuscript draft letter is signed by Town Development Officer, Deputy Municipal Commissioner and Municipal Commissioner on 4.9.1992. The duplicate copy of the letter typed on the letterhead is also in the file. It is on the basis of this letter the matter was placed before the Town Planning Committee on 12.10.1992 and resolution was passed. The translated version of the resolution is as under:

"Resolved that :- From the letter No. TPS General, 2599/dated 5/9/1992 of the Municipal Commissioner it has come to knowledge that in the residential zones of the City of Karnavati by showing permissible uses like for Banks and Nursing Homes, Buildings Plans are got approved but they (buildings) are put to commercial use. This activity has developed a lot in last few years. For stopping this activity, it is necessary that restrictions are placed on the same.

Long time is taken in stopping such illegal use for various reasons including

limitations of the department. During this period those who have committed breach and transferred the premises to others have escaped from the penalty. When notices are to be implemented new owners are in difficulty. Therefore, it is necessary to take deposits as an effective measure where there is illegal use.

Thus if the illegal user, gives an undertaking and unconditional acceptance, that within 2 years from the date of the resolution he will stop such use, then in that case, by taking a deposit of Rs.600/- per sq. mtr., for that period the notice will not be implemented. This sanction is granted (subject to the sanction of the Municipal Corporation) to the Municipal Commissioner to request for charging on this basis.

Sanction of the Municipal Corporation to be obtained."

##. Thus, reading the resolution, it is clear that this resolution was subject to the approval of the General Body of the Municipal Corporation. Soon thereafter, this Court stayed the operation of this resolution by an order dated 21st October 1992 (Coram: A.P. Ravani & Y.B. Bhatt, JJ.).

##. In the file there is one letter addressed by Deputy Secretary, Urban Development & Urban Housing Department, Sachivalaya, Gandhinagar. Along with the letter, a newspaper cutting of Times of India dated 10.9.1992 was also forwarded. On the letter, there are notings by several officers. Along with a letter, there is xerox copy of a newspaper cutting indicating that the same is forwarded by the Information Department, State of Gujarat. In the margin as well as the letter, the name of the newspaper is mentioned as Times of India, Ahmedabad edition dated 10.9.1992 while the news item is in vernacular; However, we have our own doubts about the notes in the margin because Times of India is published only in English language. The news item refers to recovery of Rs.600/- per sq. mtr from the persons who have carried out unauthorised construction. (This has reference to proposal to be placed before the Planning Committee).

##. Thus, it is very clear that the Municipal Commissioner was aware about the fact that litigation was pending in the High Court. In the file there is original

writ issued to the Corporation along with the endorsements made thereon by the officers of the Corporation. It is required to be noted that not only the Municipal Commissioner but Town Development Officer is also a party to the proceedings along with the State of Gujarat through the Secretary, Urban Development and Urban Housing Department, Sachivalaya. Even after the order was made by the Court on 21st October 1992, for a meeting which was to be convened on 27th November 1992 at 6.00 p.m. at Gandhi Hall, the resolution was placed at Sl. No. 107 for approval. The said letter is signed by Committee Clerk, Co-ordination Department (Sankalan Vibhag), Board and Committee, Central Office. The Division Bench restrained the Corporation from implementing this resolution. Yet it appears that the resolution was placed before the Corporation for sanction. However, we must say that there is nothing in the file to indicate that the Corporation has sanctioned the same.

##. Another file is placed before us about "Conversion Licence Fee" and "Value Added Fee". There is one letter addressed to the Municipal Commissioner on 18.4.1994 pointing out that on C.G. Road, the residential area is converted into commercial area during the last 4/5 years. It is mentioned in the letter that it is not possible to control this activity in time with the present provisions of law as well as machinery with the Municipal Corporation. It was suggested that administrative action should be taken so that the area is not spoiled. It was suggested that the decision should be taken in such a way that it cannot be changed in future. The author was conscious of the fact that the process of variation of plan is too long and the development plan finalisation takes not less than 6/7 years for its final sanction. A proposal was therefore placed before the Commissioner stating that the administrative policy should be incorporated in future development plan and that should be adopted for the present. It was suggested that the name and policy should be "value added use in residential zone for non-residential use". The author of the letter took shelter of Regulation No. 53 which is meant for granting permission to Government offices, education institute, public institute, building of charitable trust for public uses and hospitals in residential zone. The author of the letter, the Deputy Municipal Commissioner was of the opinion that it is not wrong to grant permission to private plot holders also by charging licence fee for particular use in the residential zone. The author has also mentioned that the AMC has approved covering of gallery, projections etc. after charging

some fee and has further stated that though this regulation is not approved by the Government the Corporation and AUDA are giving this permission. Thus, the author was aware that without sanction, they have permitted unauthorised construction and has suggested to permit similar unauthorised recovery of amount for permitting change of user. There is a draft manuscript letter in vernacular. It appears that Deputy Municipal Commissioner (UD) addressed a letter to the Municipal Commissioner wherein there is a reference to representation made by several persons before the Corporation and the State Government. It indicates that the persons having licence for development, investors, persons concerned with the building activities and other persons who were interested have made representation. The question being put about notings in the file about such representation or the letters received from such persons, we were told that in the file there is no such noting or letters. On what basis this is indicated is difficult to understand. However, Mr. Vakil, learned counsel, after going through the file in detail pointed out that at page 19 there is xerox copy of the same letter which is signed for and on behalf of the Municipal Commissioner. Original is found at page 15. Page 17 is a xerox copy of page 15 which is a part of letter at page 13 addressed by the Municipal Commissioner. At page 15 there is a letter signed by Municipal Commissioner dated 23.5.1994. However, the original page No.1 of the letter is not there. Though typed copy is there at page 17. Page 23 is a letter to Deputy Municipal Commissioner which is a xerox copy only. The original number appears to be changed by scoring out the original number. On reverse of page 23, there is xerox of a letter. Thus pages 23 and 24 are nothing but original of pages 9 and 11. Pages 39 and 41 are xerox copies of letter dated 23.5.1994, original of it is at pages 17 and 19. While pages 39 and 41 are copies of pages number 17 and 19, on xerox copies the numbers are scored off. Page 43 is a xerox copy of Administrators Resolution No. 1087, the original of which is at page 21. Page no. 21 was given number as 25 originally, but that has been scored off and has been re-numbered. Letter at page 13 dated 23.5.1994 is a xerox copy while page 2 of the letter at page 15 is original. Thus, original page No. 13 is missing.

##. In the file all the papers are given odd numbers and upto Sl. No.19 are in proper order. From pages 21 to 43 at several pages, it appears that page numbers are changed. What was the reason for changing page numbers in the original file is not explained. At some pages, pages are changed thrice. Some of the documents, where

original are there, and xerox copies are placed and numbers are given. There is no explanation for such change. All subsequent pages after 45 are in order.

##. Mr. Thakore further submitted that what transpires from the whole situation viewed from a closer angle is that eventhogh there was no proposal to vary the Development Plan and eventhough there was no proposal to offer any compensation to the affected people, yet action has been taken by the Corporation which indicates total disregard to the provisions contained in the Act and thereby the Town Planning Committee of AMC, the Municipal Commissioner and the Administrator at the relevant time misused the power with a view to favour a class of people only.

##. The officers of the Corporation do not possess uncanalised or unbridled power as it is controlled under the Act. The officers of the Corporation are required to use the powers in furtherance of the policy or for achieving the purpose for which the Act has been enacted. If the powers are not exercised by the officer concerned, then it could be said that the officer has failed in discharging his duties. In the instant case, it is demonstrated that the Municipal Commissioner / Administrator at the relevant time acted beyond the provisions arbitrarily, illegally to assist the specific class who can pay money to the Corporation and even thereafter did not bother to see that parking is provided or not.

##. Mr. Mihir Thakore further submitted that a Nursing Home is required to be registered under the provisions contained in the Bombay Nursing Homes Registration Act, 1949 (hereinafter referred to as the Nursing Home Act). Under the Nursing Home Act, in a Municipal Area, the Municipality established for such area is the local supervising authority. Therefore, with the Municipal Authorities, applications are required to be made for registration of Nursing Homes and it is for the Municipal Authorities to grant or refuse the registration. He submitted if on one single road, large number of applications are made for nursing homes, one would obviously inquire the fact whether nursing homes are actually functioning or not, or after getting permission, the premises are used for the said purpose or not. When they were aware about the change of user and unauthorised construction since 1989, which is clear from the record as well as from the advertisements published by the Municipal Corporation itself it was the responsibility of

the Corporation to take more care to see that the plans are approved only after satisfying that purpose for which the building is to be erected is for the genuine purpose of nursing home.

##. Mr. Thakore further submitted that regulations are required to be sanctioned by the State Government as contemplated in section 17 of the Development Act. Even when there is a question of draft development plan, it requires publication and inviting of suggestions or objections as per section 14 of the Development Act, and the same are required to be considered. He pointed out from the various provisions of the Development Act that once the development plan is made final, then any variation to be made can be made only after following the procedure, and not otherwise. Merely because some builders wanted to construct commercial complexes in a residential zone, where price of land was very high in view of non-availability of land, the Administrator of the AMC or the Town Planning Committee of AMC could not have passed resolution to collect money for AMC and to allow the use of building for commercial purposes in a residential zone contrary to law.

##. Residential Use is defined in clause (29) which reads as under.

> "(29) "Residential Use" shall mean a use of any building unit for the purpose of human habitation only."

##. It is required to be noted that in order to promote public health and safety, general moral and social welfare of the community, it was necessary to apply reasonable limitations on the use of the land and building. That was with a view to ensure that the most appropriate, economical and healthy development of the city takes place in accordance with land use plan and its continued maintenance over the years. It is for this purpose the city was divided into a number of "use zones" such as residential, commercial, industrial, recreational etc. Each use zone has its special regulations because a single set of regulations can not be applied to the entire city, as the different use zones vary in their character and function. In this respect, zoning regulations differ from building codes or sanitary codes which in general apply uniformly to all land or buildings of like use and character wherever they may be located in the Community. Zoning Regulations are not to be used for nuisance control nor can they be used to accomplish any kind of human segregation like excluding certain

communities, or income groups from certain areas. Zoning protects residential areas from the harmful invasions of commercial and industrial uses, while it also promotes business and industry by the very nature of the planned and orderly development that it ensures. By requiring the spacing of buildings it provides adequate light, air, protection from fire etc. It prevents over-crowding in buildings and land and thus facilitates the provisions and continued adequacy of water sewerage transportation, schools, parks and other facilities.

##. Mr. Thakore submitted that keeping the above in mind, the Court will have to appreciate the relaxation part with regard to the FSI. Floor Space Index is also provided in clause (22) in Chapter II which reads as under.

"(22) "Floor Space Index" of a plot, building unit or premises shall mean the ratio of the combined gross floor area of storeys including the area of all walls as well as mezzanine floors of a building on a plot, building unit or premises to the total area of the plot, building unit or premises.

Provided that the following shall not be counted towards computation of floor space index:-

(i) space under a building constructed on stilts (plinth on pillars) and used as a parking space.

(ii) A basement or a cellar,

(a) used for air-conditioning plant room, safe deposit vault of a bank and parking space

(b) constructed below residential buildings and to be used as storage space.

(iii) Electric cabin or an electric sub-station, water pump room garbage shaft, elevators (lifts), stairs, electric meter room.

(iv) projections, architectural features, chimneys and elevated water tanks.

(v) Minimum area required as an entrance lobby under these regulations.

(vi) Ramps leading to cellar or upper floors.

(vii) Chowks open to sky.

(viii) Well, borings and tube-wells.

##. Similarly, Mr. Thakore drew our attention to high rise building, residential use and relaxation in FSI. So far as the relaxation part is concerned, it finds place in Chapter 18. Clauses (1) and (2) thereof are as under.

(1) In case of plots owned by : (i) Local Authority (ii) Government (iii) Housing Board and (iv) any corporate body constituted under a statute, the Municipal Commissioner may for reasons to be recorded in writing relax or waive any of the scheme regulations in the public interest.

Provided that no relaxation or waiver of any of the scheme regulations concerning built-up area, consolidated open space, marginal open spaces, provisions of high-rise buildings and F.S.I. shall be made.

(2) Not withstanding anything contained in foregoing regulations of the scheme, in cases where these regulations cause hardships to the owners because of their application to the alterations not involving addition to the existing structures erected prior to the coming into force of these regulations, the Municipal Commissioner considering the merits of each individual case may relax or waive, for reasons to be recorded in writing, any regulation of the scheme.

Provided that this relaxation shall not be made in any regulation for high-rise building."

##. It is in this background, he invited our attention to the provisions with regard to parking. So far as parking is concerned, there is provision in Chapter 15. Relevant part of in clauses 45(a) reads as under.

"(a) Parking spaces as required under the Town Planning Scheme Regulations or Building Bye-laws shall be provided either on the ground floor or below the ground level in cellar.

##. So far as revenue survey numbers are concerned (old city or where TP Scheme is not there) the provisions of parking is not to be enforced on the building units having an area of 500 sq. mtrs. or less as per regulation 31. As per rule 40, the occupation permission is not to be issued unless the space enforced as parking is paved.

##. Thus, it is the bounden duty of the owner to provide parking space. Clause 46 reads as under.

" The parking space shall be provided on each plot on the basis of maximum permissible floor space index. Provided that in case wherein the owner agrees in writing to provide required parking space when he would construct upper floor and further indicates satisfactorily the mode of such a provision in future, the provision of complete parking space may be postponed at the time of ground floor construction."

##. Thus, the rule provides that in case a ground floor is constructed, the owner has to agree in writing as mentioned in clause (46) to provide parking in future.

##. So far as parking arrangement is concerned, strict compliance is absolutely necessary. In the year 1997, with the Regional Transport Authority 9,18,589 vehicles were registered till June 1997. Very recently, Ahmedabad City Traffic Police conducted a study, and as regards vehicular growth, it is stated that the rapid growth in population and area is accompanied with even more rapid rise in vehicle numbers. There were only 45000 vehicles registered in the city of Ahmedabad in 1971. This has gone upto 12 lakh by the year 2000. During the next 10 years, the number of vehicles is likely to reach 35 lakhs in figure. Over and above these, as estimated, three to four lakhs of vehicles enter Ahmedabad city daily. It is to be noted that about 45,000 handcarts and 1200 camel carts also ply on the roads of Ahmedabad for transporting goods. It is interesting to note from the study conducted by Ahmedabad City Traffic Police that in 1981 there were only 64,945 two wheelers which in 1991 has gone upto 2,79,498. Similarly in 1981 there were only 21,605 Car/Jeep which in 1991 has gone upto 36,602. Similarly, as against 610 AMTS buses in 1981, in 1991 there were 756 AMTS Buses. The figures are only till 1991 and there will be multifold increase in all these figures in the year 2000. Considering the population of the Ahmedabad, for every four persons there is one vehicle. Obviously that would require sufficient place for parking also. Over and above these vehicles, there are thousands of visitors to the city every day who are coming in their own vehicles or by hired vehicles. As stated above, number of transport buses, regularly operate in city by Ahmedabad Municipal Corporation not only within the city limits but within larger area covered under Development Act. Approximately 50,000 autorickshaws are operating providing quick transport service. Transport buses are operated by private transporters from various parts in the city. Over and above this, State Road Transport Corporation operates

buses from congested area of the city which are passing through various roads of the city. Their frequency/trips have also increased. All these aspects were required to be taken into consideration. Looking to the fast development and need of the people vehicles are increasing every day in the city. In view of expansion of city, and considering distance and time, use of vehicles has increased a lot.

On account of blessings of the concerned department, even some residential buildings are permitted to be used as office complexes without prior approval, without providing parking. Office complex is occupied by many people and the premises are to be visited by number of people which would lead to abnormal movement of traffic and that really causes the problems for the residents of Ahmedabad. Neither police is able to manage nor the Corporation is able to manage in this regard.

##. It is required to be noted at this stage that before few years, when the land was not costly in Gujarat, there was concept of private property only. For providing better housing facilities, Government provided land for construction of houses and many Co-Operative Housing Societies came into existence in Gujarat and in particular in Ahmedabad. Because of the facilities for loan etc. societies were formed. However, at that stage, even principle of ownership in property continued. After the land became costly and the provisions of Urban Land (Ceiling & Regulation) Act were brought into force, the land was not easily available to a person in the city, and, therefore, big old bungalows came to be demolished by investor / builder /developer / organiser and by forming an Association of Persons or Non-Trading Association, activities of high-rise buildings developed very fast. Ownership of property with land started evaporating in cities. It is apparent from the facts placed before us that it is these builders, organizers etc. used to get permission from the Corporation for erection of buildings in residential zone for the purpose of residence or for the purpose permissible in predominantly residential zone as indicated in Annexure A-1, nursing homes etc. and use the buildings for the purpose other than nursing homes or residence. Not only that, even in such building, the place which was required to be reserved / kept open for parking came to be disposed of by constructing shops/offices by one or the other mode by the persons interested in earning and purchaser interested in shops / offices, despite the advertisements given in the newspapers by AMC, either by ignoring the provisions of the law or by taking the risk

of their own, started to purchase / acquire the property and by this activities, problems with regard to parking was created. In a residential premises, number of people would be limited and number of vehicles would be also limited, as against this in a commercial complex or office complex, the number of people coming to the building either for work or as visitors would be much more. In such a situation, if parking place is disposed of by unauthorised construction, the situation would be worsened. Infact that has happened. The resultant effect is that people park their vehicles on the roads/footpaths.

##. So far as the roads are concerned, it is a public property. As pointed out by the Apex Court in the case of OLGA TELLIS AND OTHERS VS. BOMBAY MUNICIPAL CORPORATION AND OTHERS (AIR 1986 SC 180) no one has the right to make use of a public property for a private purpose without the requisite authorisation. In paragraph 8 of the case of AHMEDABAD MUNICIPAL CORPORATION vs. NAVABKHAN GULABKHAN AND OTHERS reported in AIR 1997 SC 152, the Court has reiterated the views laid down by the Apex Court in OLGA TELLIS case. The Court observed as under:-

> "No person has a right to encroach by erecting a structure or otherwise on footpaths and pavements or other place reserved or earmarked for a public purpose like (for e.g. garden or playground) and that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case".

##. The Hon'ble Apex Court pointed out that it is the duty of the competent authority to remove encroachments on pavement or footpath of the public street obstructing flow of traffic or passing or re-passing by the pedestrians. In our opinion, the same principle will apply for unauthorised parking of vehicles on roads and of two wheelers/bicycles on pavement/foot path. If parking as per law is provided, such situation may not arise.

##. Thus, roads are meant for frequent movement of the vehicles. Foot paths are meant for easy movement of the pedestrians. Roads are not meant for parking of vehicles. Wherever it is convenient and possible, appropriate authority may provide parking or parking plots. It is not possible to allow the roads tobe used for parking the vehicles where there is heavy traffic. If vehicles are parked regularly on the road, atleast one

lane will be utilised by the vehicles owners and that too for the purpose of parking only and lot of people will be put to inconvenience. In this background it is insisted by the rule makers that parking in every building must be provided as per building regulations. What actually happened is though parking was shown in the plans approved, the parking space has been converted into shopping complexes or godowns or shops with the result that the people occupying the building and visitors are compelled to park their vehicles on the road. This cannot be permitted.

##. To a pointed query put to the learned Additional Advocate General about the fact whether even after unauthorised collection of money under the Corporation's resolutions the builders have provided parking, we were told that parking is provided in few buildings. We were given figures by the learned Additional Advocate General, pointing out to us that after conversion fee as per resolution, in all 221 buildings have been erected in the city of Ahmedabad. From the table which is signed by the officer of the Corporation on 13.9.2000 it appears that in all 223 applications for erection of buildings were received along with conversion licence fee. Out of this, in 144 buildings parking as well as COP is open and people are able to park their vehicles. However, in 46 buildings, parking place has been covered and people are not able to use this place for parking. It is submitted that in 10 buildings, erection work is yet to be completed and in 22 buildings, erection work has not yet commenced. With regard to one building, nothing has been done. The officer has also given the figures zone wise. It appears that in West Zone, permission has been granted for 136 buildings out of which in 98 buildings parking/COP is provided, and in 21 buildings parking is covered; In South Zone, in 26 buildings parking and COP are kept open and in 24 buildings parking is not open. In East Zone, parking/COP is open in 5 buildings and in one building parking is not open. In the North Zone, in 12 buildings parking/COP as per the plans exist. Similarly, there are three buildings in the Central Zone. In zone wise figures, the buildings which are not complete or for which no work of erection has commenced have not been discussed. Thus, it is clear that there are only 46 buildings where the parking facilities have not been provided though in a plan it was specifically mentioned that place has been provided for parking. Therefore, this violation must be dealt with strictly because it affects the public at large. These figures refer only to the buildings erected on payment of conversion charges as per resolution of 1994.

##. So far as the unauthorised constructions is concerned, in our order dated 18.9.2000 passed in Spl. C.A. No. 6258/2000, we have recorded the following passage from the affidavit of Municipal Commissioner:

"In this matter, Municipal Commissioner has filed an affidavit before us indicating the nature of irregularities which are referred to in paragraph 5, which reads as under:

'"I have been informed by the Town Development Officer of the Municipal Corporation that there are about 9200 cases, where breach of the Act and the Building By-laws has been committed by the persons and to whom notices under the provisions of Chapter 15 and other provisions of the Act, have been issued by the Municipal Corporation. Broadly speaking the aforesaid cases could be classified into four categories.

(A). Parking violations, which comprise of

(i) Constructions having been made in the hollow plinth.

(ii) Conversion of use in the cellar for purposes other than parking.

(iii) Conversion of use of the Cellar below Consolidated Open Plot (COP).

(B). (i) Constructions having been carried out in Reserved Plots in the Town Planning Scheme or in the Development Plan.

(ii) Total Construction being illegal viz. without obtaining any permission whatsoever from the Corporation.

(iii) Construction covering the majority portion of the Margin to be kept open in a plot and around the building.

(iv) Committing breach of Built-up Area limit by constructing beyond 20% and 30% of the maximum permissible limits in high rise and low rise buildings respectively.

(v) Committing beach of FSI by constructing beyond 20% and 30%

of the maximum permissible limits in high rise and low rise buildings respectively.

(C). Building violations comprising of

(i) Committing breach of Built-up Area limit by constructing upto 20% and 30% beyond maximum permissible limits in high rise and low rise buildings respectively.

(ii) Committing breach of FSI by constructing upto 20% and 30% beyond maximum permissible limits in high rise and low rise buildings respectively.

(iii). Construction of Pent-House on the terrace.

(D). Minor violations comprising of:

(i) Covering Gallery

(ii) Covering chowk/cut-out

(iii) Making small constructions in the margin - being minor in nature and not occupying more space in margin.

(iv) Extending Bunglow/Tenament/Flat being minor in nature.

In paragraph 6 he has pointed out that only 40% of the cases would probably fall in categories (A) and (B)."'

From the record placed before us, it is very clear that major violation is largely in High Rise Buildings which requires a serious note.

##. Mr. Mihir Thakore, learned counsel further submitted that as per the bye-laws, there are recognised stages for the progress certificate. He submitted that clause 17 of the Manual I, Part II, Chapter III provides that the recognised stages for progress certificates are: (1). Excavation, (2). Construction of foundation, (3). Plinth, (4). First Storey and, (5). Each subsequent storeys. Sub-clause (ii) of clause 17 provides that the Municipal Commissioner shall be given atleast four clear days' notice in writing of the time at which the work will be ready for inspection. It also provides that the progress certificate under the byelaws is required to be given in Form III. Clause 18 is relevant and it reads as under:-

II.18 On receipt of the progress certificate from the Supervisor, it shall be the duty of the Municipal Commissioner to check any deviation from the approved plan which may require submission of an amended plan for approval of the Municipal Commissioner and the details specified in the bye-laws No. II (11).

##. Thus, it goes without saying that when the construction is in progress, it is the duty of the Municipal Commissioner to check the construction. If the construction is not in accordance with the approved plans, the Municipal Commissioner has got every right to stop the construction until the amended plans are approved by the Municipal Commissioner or the construction is made as per plans. The plans or amended plans again must be as per bye-laws/building regulations.

##. Rule 19 provides that on completion of the construction, it shall be incumbent on the person whose plans have been approved to submit a Completion Report in Form IV. It further provides that the completion plans is also required to be approved by the local authority and no completion report or completion certificate shall be accepted unless a completion of plans referred to in the bye-laws is approved by the local authority.

##. Qualifications and experience of persons licensed to act as Surveyor, Architect, Engineer, Structural Designer and Clerk of Works etc. are prescribed in Rule 15. It is the responsibility of these persons to see that the building is erected only in accordance with the approved plans and the bye-laws/building regulations. If Rule 12 and 16 are read together, it is clear that it is the responsibility of these persons to see that buildings are constructed as per the approved plans. At the time of granting permission to erect a building, there must be strict compliance of the rules relating to the restriction and control in construction of a building to the floor space index, front setback, side setback, parking requirements including provisions of standby generator, transformer room and meter room and floor space requirements, construction abutting to the road with corridor with permissible floor area limits of nursing homes and height of rear construction.

##. So far as the persons licensed to act as Surveyor, Architect, Engineer, Structural Designer and Clerk of Works etc. are concerned, it is these licenced

professionals who are equally responsible if the building is not erected in accordance with the rules, building regulations and approved plans. They have not to act merely as per the the desire or advice of the builder/owner. They being professionals, have to adhere to professional ethics and they owe a duty to the Society. Under the Rules, they have to act as per the plans approved and have to erect the building as per the rules and byelaws. In our opinion, the Corporation must initiate appropriate action to de-licence such professional persons and initiate punitive action against them both civil and criminal as is permissible under law, who are directly or indirectly responsible for erection of buildings otherwise than the approved plans. It is the responsibility of the licensed engineer, supervisor etc. to report to the Corporation, if erection is not as per the plan. It is in view of this, the Corporation should immediately take action against these persons also. If such licensed persons permit to carry out erection of buildings in contravention of the provisions of law, then , in the city, these people will create further jungle of cement and concrete. We hope that the Corporation will take this aspect very seriously and take action in the matter. We have already issued a direction in AO 441/1998 dated 6.9.2000 to report to this Court within a period of three weeks in this regard. It is directed that the Corporation shall report to this Court about the action taken against such professionals who are concerned with unauthorised erection of buildings in Ahmedabad City, within a period of eight weeks from today. It is also directed that AMC shall inform the Institute of Architects (corrected as per order dated 10/10/2000 passed in Speaking to Minutes) Council of Architecture under the Architects Act in case any Architect has abated, aided or assisted in erection of a building contrary to the BPMC Act, rules, regulations, byelaws and contrary to the permission granted for taking action according to the Architects Act.

##. Mr. Mihir Thakore, learned counsel submitted that in the aforesaid background, both Annexure 'G' to the petition and the resolution passed by the Administrator being Resolution No. 1087 dated 17.11.1994 require to be quashed and set aside, having no authority of law and being violative of Article 14 and 21 of the Constitution of India. Mr. Thakore submitted that both these resolution if read it becomes clear that it authorises only rich persons to commit a breach of law, viz. building regulations and use zone, and the person who has no means to pay has to suffer. He submitted that when law does not authorise to collect money in this fashion, the resolutions even if approved by the development

authority and are inserted in the development plan, would be violative of Article 14 of the Constitution, and resultantly are required to be quashed as having no authority of law. He submitted that in the above background, to permit a person to erect a building contrary to the regulations as it is found and to allow the use of the building in contravention of the provisions of law, such erection and permission to use are bad, illegal and without authority of law. Till the zoning system prevails, viz. residential zone, use can be restricted for the purpose enumerated in Annexure A-1. To be more specific, the property cannot be used for commercial purposes or office purposes in a residential zone, and granting such a permission is bad in law and the authorities must be directed to strictly implement the zoning regulations, building byelaws, rules and regulations. He further submitted that in view of permitting commercial buildings in a residential zone, and that too without parking facilities, the people at large are put to inconvenience and it obstructs smooth movement of traffic despite the fact that there are four lanes on the C.G. Road. He further submitted that a portion of the road is converted into parking place and thereby the size of the road is reduced, and had there been no such parking, there would have been a three lane road on each side for movement of traffic, that is to say, C.G. Road would have been a six lane road, as a result of which there would have been smooth traffic and there would have been less pollution.

##. Article 21 of the Constitution must be strictly enforced. Local government is bound to see that the life of the persons residing in the city is made meaningful, complete and worth living.

##. People in search of work, move to urban agglomeration. All amenities and living conveniences also attract people to move from rural areas to cities. Industry is equally responsible for concentration of population around the industries. It is the responsibility of the local government to see that the people who are coming to the cities are under the law compelled to have accommodation in such a way that it may not affect adversely the life and liberty of other citizens. It appears that keeping this aspect in mind, the Development Act as well as the provisions contained in the BPMC Act are required to be strictly implemented. Right to decent environment and smoke free and pollution free environment follows from the quality of life which is guaranteed by Art. 21 of the Constitution. The Rules are made with a view to see that proper parking

facilities are provided and roads are sufficiently widened to see that on account of increase in number of vehicles, people moving on their own from one place to another place are not adversely affected.

##. On account of requisite parking being not provided, the roads are being congested on account of bottle-necking, and the people suffer a lot. That would affect their health and would create several problems. On account of absence of parking, the people park their vehicles on the roads and footpath, as a result of which, common man finds it very difficult for moving from one place to another place. This causes not only inconvenience but causes health hazards and in our view, the action not taken by the officers to avoid such a situation would not only require to be condemned but would require to be taken very seriously by the Corporation. If the Corporation is not strictly adhering to the plans as per the Rules and Regulations, it is not only permitting other to contravene the provisions of law but that would amount to inroad Article 21 of the Constitution. In view of the aforesaid provisions, as earlier stated, even in the affidavit, the Municipal Commissioner has made it clear about the fact that the resolution could not have been implemented.

##. So far as the first resolution (of 1992) is concerned, occupiers are not permitted to occupy for ever, but only for a period of two years. The Corporation has also conceded before us that it had no authority, power or jurisdiction under the law to implement the resolution which was in the nature of a recommendation. Hence the first resolution is required to be quashed and set aside.

##. In view of what is stated hereinabove, both the resolutions, i.e. resolution dated 12.10.1992 passed by the Town Planning Committee and resolution dated 17.11.1994 passed by the Administrator, are quashed and set aside. It is directed that the Municipal Corporation shall strictly adhere to the use zones and shall permit erection of buildings and use and occupation of the new as well as the existing buildings strictly in accordance with the rules, regulations, byelaws as are applicable to the use zones.

##. Mr. Mihir Thakore, learned counsel drew our attention to Regulation 53 of Part-I 'Permissions and Zones', which reads as under:

53. The Municipal Commissioner may permit for

reasons to be recorded in writing Government offices, education institute, public institute, building of charitable trust for public uses and hospitals in residential zone after considering the merits and demerits in residential zone in each individual case."

Relying on this he submitted that only Government offices, education institute, public institute, building of charitable trust for public uses and hospitals can function in residential zone, and that too, after considering the merits and demerits in each individual case. Thus, it is clear that use of a building for commercial purpose is not envisaged in a residential zone. Even the Government is required to obtain permission from the Municipal Commissioner for establishing its office building in a residential zone and the Commissioner is required to consider the merits and demerits of the case and to pass an order recording reasons in writing.

##. Our attention was also drawn to Rule 3 of Part-I, Permissions and Zones. It provides that the erection of the buildings should be in conformity with the rules. It prohibits use of a building except for which the use was sanctioned, and any other use cannot be permitted under this Rule. So far as change of use is concerned, it provides that no building or premises shall be changed or converted to a use not in conformity with the provisions of these rules. Regulation 4 provides that where the use of a site is specifically designated on the Development Plan, it shall be used only for the purpose so designated. In view of the fact that there is no dispute about the fact that the area is in a residential zone, buildings in such zone cannot be permitted for any purpose other than residential or for the purposes permissible in a residential zone. No building can be used as a shopping/office complex.

##. Mr. Thakore further submitted that so far as the second resolution passed by the Administrator is concerned, it was kept as a secret resolution, in the sense that it was not made known to the public at large, but was known only to the builders lobby. It is admitted position that no public advertisement was given about this resolution. In the case of KUMARI JAYSHREE vs. STATE reported in 20 GLR 614, the Court has pointed out certain basic principles of law in paragraph 20 of the judgment, which is reproduced below :-

"In a society Governed by the rule of law,

> certain basic principles must be observed. One of such principles is that enactments or orders governing public rights and duties must be open and adequately published and that they should be relatively stable. If such enactment or order is to guide the people, they must be able to find out what it is and it should not be changed too often.

The Court further pointed out that the rule of law in this context means that Government in all its actions is bound by rules fixed and announced before hand - rules which make it possible to foresee with fair certainty how the authority will use its powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is.

##. Mr. Mihir Thakore pointed out that in the instant case, the second resolution passed by the Administrator was not published and was not made known to the public at large and only a selected class was given an opportunity to take advantage of the same, though it was merely a recommendation. Had it been published, even the petitioner would have come to know much earlier, and would have moved the Court. Had it been published, possibly the situation could have been avoided.

##. The question now before the Court is: where public bodies, under colourable exercise of powers recovers money from a selected class of the society without authority of law, which is later found to be an erroneous levy, should the amount be returned to the persons?

##. The Supreme Court, in the case of SHIV SHANKAR DAL MILLS vs. STATE OF HARYANA reported in AIR 1980 SC 1037 held that Article 226 grants an extra ordinary remedy which is essentially discretionary, although founded on legal injury. It is perfectly open for the court, exercising this flexible power, to pass such order as public interest dictates and equity projects. It is further pointed out that where public bodies, under colour of public laws, recover people's money, later

discovered to be erroneous levies, the dharma of the situation admits of no equivocation; There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs; Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of 'alternative remedy' since the root principles of law married to justice, is ubi jus ibi remedium.

##. As against this, Mr. Thakore submitted that the persons are not entitled to refund of the amount because the amount was paid illegally and they have enjoyed the change of user and have gained profit and advantage by using the property for commercial purpose. Mr. Thakore further submitted that despite the illegal action , on the part of the Municipal Commissioner, to permit the use of a building for commercial complex, the parking is not provided and the people have suffered a lot. He further submitted that despite the fact that the amount was collected for the use of commercial complex, the Corporation has not bothered to see that parking facilities as indicated in the plan are provided. As such, the occupiers have enjoyed the property unauthorisedly and made huge profit, and, therefore, they are not entitled to get the amount. Mr. Thakore also submitted that nobody has come forward before the Court to claim the amount because they knew very well that they have paid the amount for the change of user which is not permissible. He further submitted that had they been charged contrary to law, they would have definitely knocked the door of the Court, but they were party to this wrong and, therefore, they have not come forward, and they are not entitled to refund.

##. It is true that so far as the first Resolution is concerned, permission was granted to the persons using the property for purposes other than for which the plan was sanctioned on condition that they shall stop such use within a period of two years. In most of the cases, there is gross violation of this undertaking. Therefore, even on the basis of the resolution having no force of law, such persons are not at all entitled to any refund. On the contrary, they should be dealt with seriously for the continued occupation at the cost of inconvenience and annoyance and at the cost of public at large.

So far as the amount paid under the second resolution passed by the Administrator is concerned, as stated above, the same was not made known to the public and only a selected class of the Society was made aware

of such Resolution. This goes to show that such a Resolution was passed behind the back of the public at large, with the active connivance of the said class of the Society and they have played fraud on the public at large. In the circumstances, even those persons who have paid the money under the second Resolution passed by the Administrator are also not entitled to refund of the amount.

##. Mr. Thakore invited our attention to a decision of STATE OF MAHARASHTRA vs. PRAVIN JETHALAL KAMDAR vs. (2000) 3 SCC 460. Original plaintiff filed a suit for declaration and possession against the State of Maharashtra and others, seeking a declaration that the order dated 26.5.1976 by which right of pre-emption was exercised by defendants 1 and 2 (State of Maharashtra and the Deputy Collector and Competent Authority, Urban Land Ceiling, Nagpur respectively) to purchase the property in question and the sale deed dated 23.8.1976 obtained from the plaintiff in pursuance of the said order were null and void and do not confer any right, title or interest in the property in favour of defendants. A decree for possession was also sought against refund of Rs.2,60,000 received by the plaintiff under the sale deed dated 23.8.1976. In Bhim Singhji vs. Union of India reported in (1981) 1 SCC 166 the Apex Court upheld the validity of the Urban Land (Ceiling and Regulation) Act, 1976 except section 27 (1) insofar as the said provision imposed a restriction on transfer of any urban or urbanisable land within a building or a part of such building, which was within the ceiling limit. Section 27(1) to the extent is sought to affect the right of a person to dispose of this urban property within the ceiling limit was held invalid. In view of this decision, the plaintiff claimed in the suit that the order dated 26.5.1976 and sale deed executed pursuant thereto on 23.8.1976 were null and void since what was sought to be sold to the prospective purchaser was the property within the ceiling limit and the plaintiff was entitled to a decree of declaration that the impugned order and the sale deed are illegal and invalid and do not confer the right of ownership on the defendants. The possession taken pursuant to above was claimed to be illegal and thus the plaintiff is entitled to recovery of possession besides damages for wrongful use and occupation at the average market rental value of the property. The suit was dismissed by the trial Court, but in appeal, the High Court reversed the decision and passed a decree for possession in favour of the plaintiff on his deposit of a sum of Rs.2,60,000/- which has been directed to be paid to the appellant-defendants, and against the decision of the Mumbai High Court, State of

Maharashtra approached the Supreme Court. In this situation, the Apex Court held that the order dated 26.5.1976 was without jurisdiction and a nullity. Consequently, the sale deed executed pursuant to the said order would also be a nullity.

The Apex Court also referred to the judgment in the case of Ajudh Raj vs. Moti reported in (1991) 3 SCC 136 wherein the Apex Court held that if the order has been passed without jurisdiction, the same can be ignored as a nullity, that is, non-existent in the eye of law and it is not necessary to set it aside.

##. Mr. Thakore submitted that in the instant case, there is inherent lack of power. He further submitted that the Administrator or Municipal Commissioner or the Town Planning Committee had no power to permit the change of user by asking to pay money or to authorise the change of user for a period of two years by levy of a fine by passing a mere resolution, without sanction of the legislature, or to permit erection of buildings or use of buildings in contravention of the building regulations and bye-laws etc. He further submitted that if there was no jurisdiction, no equity can be claimed, more particularly when the resolution was made at the behest of the persons who were interested in erecting the building in contravention of the building regulations. However, he submitted that as none has come forward claiming any amount, the Court should not decide the issue. We agree with this submission. It is admitted fairly by learned Additional Advocate General that the Resolutions could not have been implemented. According to him, the persons who erected buildings on payment as per 1994 resolution have committed no illegality as they have acted on the basis of Administrator's resolution.

##. Mr. Desai also submitted that in several matters, the Corporation once took action to remove unauthorised construction and to put the premises to the use for which permission is granted by AMC, but the owners/occupiers/builders, by taking the law in their own hands, have again re-constructed the same. As for example, he pointed out that in Urja House, Sheeba Hotel, Animesh, Midland, Tulsi Complex, Doctor House, Klassic Gold Hotel, Ashish, Chandan Complex, China Garden, Vaishali Complex, and Ganesh Plaza etc. actions were taken to put the premises to the use for which permission was granted, but later on, at the very same place, they have carried out reconstruction. Mr. Desai submitted that in such cases, the Corporation is again required to issue fresh notices, hear the parties, take a decision again and in the meanwhile, the subsequent action is

challenged in the trial Court.

##. We have given our anxious thought to this grievance made by the learned counsel on behalf of the Corporation. So as to prevent the Corporation from taking action according to law, those people who wanted to protect the illegal construction or unauthorised use may resort to various tactics such as changing the title of the property quite often, changing the name of the occupier etc. The question in such cases before the Corporation would be, is it necessary to give notice, afford hearing and take decision each time when such a situation arises?

##. Notice is to be given only to the persons who has erected the building or executed such work as prescribed under sections 253 and 254 of the BMPC Act. Section 260 (1) of the BMPC Act does not deal with a situation where the property has been constructed and has changed the hands. Ownership of building would crystalize on its being constructed and BU Permission being granted. There would be no question of any occupier of a building when the property is under construction and no BU Permission is granted. The property is to be occupied only after BU Permission is granted. Thus, before the stage of BU permission, notice is required to be issued only to the person who is erecting such building. The Apex Court, in the case of MUNICIPAL CORPORATION, AHMEDABAD vs. BEN HIRABEN reported in 1983 SC 537 observed that the purpose of these regulation and the object of these regulations is regulating the building construction in a municipal statute, and held that it would have anomalous result if it be said that if a building is constructed illegally or in an unauthorised manner, action can only be taken against the person who is doing the unauthorised act or illegal act but after the construction of building is passed over to others, the construction of the building enjoys immunity from any action in respect of the same. When before BU Permission is granted and while building is under construction, there is no question of occupier and in such a situation, owner / builder / developer / Association of Persons is/are answerable and a person who has occupied the property without BU Permission is not being recognised as a bonafide occupier by the Corporation.

##. When the building is constructed in the name of a Co-Operative Housing Society or Association of Persons such as Non-Trading Corporation, really speaking, the Co-Operative Society or the Non-Trading Association would be recognised as the owner as the case may be, as it is their responsibility to act in accordance with law. The

members are possessing the property after BU Permission is granted in such cases through Co-Operative Societies and Non-Trading Corporation.

##. Mr. Desai submitted that considering the fact that the AMC has issued the notice, afforded an opportunity of hearing, and taken a decision considering the maps, plans approved and after inspecting the premises, the Court below should decide the matter on merit and should not casually give a direction to issue fresh notice and dispose of the matter after delayed period. He submitted that on account of delay, meanwhile property passes to others and more complications are sought to be created. Mr. Desai submitted that in the case of OLGA TELLIS, (AIR 1986 SC 180) although in a different situation, the Court pointed out in paragraph 51, as under:

"Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But the opportunity which was denied by the Commissioner was granted by us in an ample measures, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of encroachments committed by petitioners on pavements, footpaths or accessory roads."

The Apex Court in the same paragraph further held as under:

"Indeed in that case, the Court did not set aside the order of supersession in view of the factual position stated by it. But though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which we believe, he would or should have passed, had he granted a hearing to them and heard what we did."

##. Relying on this, Mr. Desai submitted that when the matter is before the Court, the Court should hear both the sides instead of relegating to the process of issuing fresh notice and to undergo the tardeous and time consuming process leading to permitting the high handed and unauthorised act of putting up unauthorised construction. We are, therefore, of the opinion that when the facts are clear, the Court should, instead of

taking technical view, should proceed further with the matter and decide the dispute.

##. In the case of GULAMALI GULAMNABI SHEIKH vs. MUNICIPAL COMMISSIONER reported in 1986 GLH 616, the Court considered the submissions with regard to opportunity of hearing and answered as under (in paragraph 14):

> "We have heard the learned Advocates for the petitioners at length in context of the merits of each case, and we are of the opinion that any inaction or delay in such cases on the part of the Commissioner would create not only a serious traffic problem by causing obstruction to the vehicular and pedestrian traffic but also could have resulted in serious safety problems to the citizens on the footpath and the road and also persons travelling in Municipal bus transport or private vehicles. In the circumstances, therefore, we reject the contention about the violation of the principles of natural justice."

##. Mr. Desai submitted that in connection with illegal constructions and unauthorised use also, remanding the matter would create innumerable problems. He further submitted that in some cases, although the notice was in accordance with law, the Courts below are not taking decision in time. Relying on the principles laid down in OLGA TELLIS case, Mr. Desai submitted that when the matter is before the Court, the Court should consider that the opportunity which could be afforded by the Municipal Commissioner is being offered to the parties had the party been relegated to the Municipal Commissioner. He further submitted that when the Court itself is hearing the parties, the Court would decide the matter on the basis of the material and there is no prejudice caused to the aggrieved parties. We agree with the submissions made by the learned advocate. We are of the view that such a course of action should be adopted in a case where primafacie the Court is of the opinion that the notice is in accordance with law and without wastage of time the Court hearing the matter could deliver the decision after hearing the parties. When the Court has heard the matter and the matter was pending in the Court for a long period, we are of the view that with a view to get justice quickly, the Court should proceed with the matter instead of relegating the parties to the forum. When notice in accordance with law was issued and after hearing the decision is rendered, no injustice is caused. If the notice is bad or illegal or without

jurisdiction or without authority of law, the Court must decide at the stage of hearing the Notice of Motion or while deciding the application for interim relief. That would avoid long waiting period for decision on legality or otherwise of the notice if decided at the time of such hearing and the Corporation is satisfied, may issue fresh notice or may challenge the decision. But parties to the litigation should know the fate of the matter immediately in such cases.

##. It is required to be noted that the officers exercising powers under the Act are also entitled to exercise powers under the Development Act. The Apex Court in the aforesaid case of MUNICIPAL CORPORATION OF AHMEDABAD CITY V. BEN HIRABEN MANILAL, in para 5 observed as under.

> "5. ..... It is well settled that the exercise of a power, if there is indeed a power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section was not referred, and a different or a wrong section of different provisions was mentioned. ...

##. In the case of HUKUMCHAND MILLS LTD. vs. THE STATE OF MADHYA PRADESH & ANR. reported in AIR 1964 SC 1329, the Apex Court held as under:

> "It is true that in the opening part of the notification it is said that the amendments were made under r. 17 of the Tax Rules; but that in our opinion would not conclude the matter, for if the Government had the power to make amendments under Act 1 of 1948, the amendments in the Rules could be justified under that power in spite of the wrong words used in the opening part of the notification of December 28, 1949. It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would not per se vitiate the actions done if they can be justified under some other power under which the Government could lawfully do these acts."

##. Thus, there is mere omission to refer to the other provisions. Other provisions are indicated and merely omission would not vitiate the action when Corporation was authorised lawfully to initiate action, especially

when the attention of the plaintiff was also drawn to the aforesaid illegal construction in question and he was given opportunity to explain the same in the notice. The Apex Court in the aforesaid case of MUNICIPAL CORPORATION OF AHMEDABAD CITY V. BEN HIRABEN MANILAL (supra) pointed out that the object must be carried out and held:-

> "7. Chapter XV of the Bombay Provincial Municipal Corporation Act, 1949 as applicable to the area concerned, deals with the building regulations and includes section 260 of the Act. These provisions are to regulate the building construction for the safety, health and well-being of the inhabitants of the particular municipality or corporation. Therefore the provisions should be read broadly which will effectuate the intention of the Legislature and prevent the mischief which was intended to be remedied or avoided by the provisions. It is well-settled that when a problem of construction comes before a court, the intention of the legislature must be given effect to as expressed in the language of the provisions. Where the language is explicit, no problem arises. Even where the usual meaning of a language falls short of the whole object of the legislature, a more extended meaning may be given to the words if they are fairly susceptible of it. The construction must not, however, be strained to include cases plainly omitted from the natural meaning of the words. It has been said very often that it is the duty of a judge to make such construction of a statute as shall suppress the mischief and advance the remedy. (See in this connection the observations of Maxwell on The Interpretation of Statutes, 10th Edition p. 68, under the heading "Beneficial Construction.")

##. Thus, what is important is policy of the legislature and whether opportunity is given or not.

##. In our decision dated 6.9.2000 in AO No. 441 of 1998, considering various decisions of this Court as well as the Apex Court, we have held that no building should be permitted to be erected or continued to be occupied in contravention of the provisions of the BPMC Act, Building Regulations and the Bye-laws, and we do not see any reasons to take a different view than what we have already taken. Therefore, so far as unauthorised construction is concerned, the Corporation must take action forthwith and should report to this Court about

the action taken on or before 3rd November 2000.

##. In view of what is stated hereinabove, (as stated in paragraph 67 above) both the resolutions are quashed and set aside. It is directed that the Municipal Corporation shall strictly adhere to the use zones and shall permit erection of buildings and use and occupation of the new as well as the old buildings strictly in accordance with the rules, regulations and byelaws as are applicable to the use zones.

##. In the circumstances, as we have quashed and set aside both the aforesaid Resolutions, we hold that the action of the Municipal Corporation permitting change of user is contrary to the provisions of law. The Corporation had no authority of law to permit the change of user contrary to the provisions of law and the use zones. The resolutions passed by the Town Planning Committee and the Administrator were merely recommendatory in nature and the AMC has erred in implementing the Resolutions without the sanction of law. The Corporation had also no authority of law either to levy conversion/licence fee or value added fee and thereby to permit unauthorised construction and also illegal use and occupation of the place meant for parking and or residence or the like.

##. So far as change of user is concerned, some occupiers are using the property in view of orders passed by the trial Court or this Court and some, who have made change of user on payment in view of the resolution made in 1994. We have considered various provisions of the BPMC Act, Development Act, Building Rules and Regulations. It is for the legislature to legislate a law or amend a law; the Court is only supposed to go into the question in these petitions whether the action of the government or public bodies is in accordance with the law in force or not, and if not, to command them to act according to law.

##. So far as the persons who have paid the amount in view of the first resolution (of 1992) are concerned, they were assured that notice would not be implemented for a period of two years only, though they were found violating the regulations. They had also given undertaking to stop the use of the premises within a period of two years from passing the resolution. That two year period is over and yet illegal change of user is continuing. The Corporation shall take action in such cases in accordance with law forthwith, and shall report to this Court about the action taken.

##. Wherever no stay is granted by any Court till today, we direct the Corporation to issue notice in accordance with law, if not issued till this date, and thus direct all such persons who are occupying and running shops / offices etc. in the place sanctioned in the plans for parking and common amenities, irrespective of the fact whether conversion/licence fee or value added fees has been paid for such buildings or not, and to see that the facilities as per approved plans and as per the law are made available to the users. The Corporation shall give them sufficient time as contemplated in the BPMC Act, Rules and the byelaws, and on the expiry of the period of notice if the premises are not vacated, the Corporation shall seal such premises and shall cause the premises to be used for the purpose for which it was sanctioned in the approved plan strictly in accordance with use zone and Building Regulations, without waiting for further orders from the Court.

##. It was made clear before us that neither in view of the first resolution nor in view of the second resolution, the requirement with regard to parking and common amenities have been waived or condoned. It was insisted in these cases that space for parking and common amenities were to be provided according to the sanctioned plans. In view of this, the Corporation is directed to forthwith ensure that the place sanctioned for parking and common amenities are made open and put to the said purposes only. Occupiers who are using premises other than the permissible use in a residential zone on payment of conversion fees as per 1994 resolutions are also not entitled to use as such and are entitled to use the property for the permissible use in a residential zone as indicated in Appendix A-1 Use Zone Table which we have discussed in detail in earlier part of the judgment and therefore the Corporation shall take appropriate steps so as to see that there is no infringement of any of the provisions. There are only about 190 buildings which are already constructed and put to use. Considering the larger interest, the Corporation shall act in accordance with the provisions of law. However, we reiterate that sufficient time as provided in the BPMC Act and the Rules made thereunder must be given to such persons, and reasonable time as provided in the Act must be granted to them to vacate the premises and to put the premises to use as permissible and as per the sanctioned plan. The Corporation shall issue such notice to every such occupier if not issued till this date soon after the copy of this judgment is received and the Registry is directed to forthwith issue copy of this judgment to the Municipal

Corporation.

##. So far as the litigations pending in the City Civil Court at Ahmedabad is concerned, the Principal Judge is directed to allot all such matters to one Judge so that there may not be conflict in orders/judgments, and that Judge can dispose of the matters quickly. The copy of list supplied by the Corporation, showing the pending proceedings pertaining to Building Regulation or Chapter XV of the B.P.M.C. Act, shall be forwarded to the Principal Judge, City Civil Court, Ahmedabad along with the copy of the judgment for compliance. The court shall dispose of the proceedings within reasonable period preferably within 3 months and priority will be given to the matters where larger section of the public are affected such as high rise building where parking is covered. The trial Court may peruse paragraph 56 for this purpose, where Municipal Commissioner has indicated the priorities in paragraphs (A), (B), (C) and (D). This is only with a view to indicate that Court must decide the matters considering the nature of breach.

##. As stated in paragraph 58, when the construction is in progress, it is the duty of the Municipal Commissioner to check the construction. If a construction is not in accordance with the approved plans, the Municipal Commissioner has got every right to stop the construction until the amended plans are approved by the Municipal Commissioner or the construction is made as per plans. The plans or amended plans against must be as per bye-laws/building regulations.

##. As stated in paragraph 61, Surveyor, Architect, Engineer, Structural Designer and Clerk of Works etc. being professionals, have to adhere to professional ethics and they owe a duty to the Society. Under the Rules, they have to act as per the plans approved and have to erect the building as per the rules and byelaws. Corporation must initiate appropriate action to de-licence such professional persons and initiate punitive action against them both civil and criminal as is permissible under law, who are directly or indirectly responsible for erection of buildings otherwise than the approved plans. It is the responsibility of the licensed engineer, supervisor etc. to report to the Corporation, if erection is not as per the plan. It is in view of this, the Corporation should immediately take action against these persons also. It is directed that the Corporation shall report to this Court about the action taken against such professionals who are concerned with unauthorised erection of buildings in Ahmedabad City,

within a period of eight weeks from today. It is also directed that AMC shall inform the Institute of Architects under the Architects Act in case any Architect has abated, aided or assisted in erection of a building contrary to the BPMC Act, rules, regulations, byelaws and contrary to the permission granted for taking action according to the Architects Act.

###. Ahmedabad Municipal Corporation must ensure that all buildings are in conformity with the present building regulations and immediate action should be taken to restore parking facilities in every building as per the regulations.

###. So far as change of use is concerned, action be taken in accordance with law without being influenced by the fact that the conversion fees were charged.

###. Corporation shall strictly adhere to zone system and shall not allow the additional construction to increase the FSI than permissible and shall permit the erection of the building strictly as per building regulations.

###. The Corporation must have an office in each zone to guide the public at large and by advertisement inform the public about zone and use of the building which is permissible.

###. When sanctioning the plans for high rise buildings, the Corporation may recover certain amount from the builder towards advertisement charges, and atleast once a month advertisement be published giving short details so as to inform public about the approval of plans and the permissible use of the building / floors in detail i.e. cellar, hollow plinth/ Ground Floor to onwards.

This direction is required to be given since it is found that in some cases, mandatory provisions are breached. Whenever a revised plan is submitted by the builder, the same formalities must be repeated so that the public is informed about permissible use of each floor/portions of a building.

###. Without B.U. Permission being granted the Corporation shall not provide water and sewage connection and if it is found that any person has illegally taken such connections, it shall be disconnected without delay.

###. Ahmedabad Electricity Company shall not provide electric connection without production of B.U.

Permission issued by the Corporation.

###. The Deputy / Assistant Municipal Commissioner incharge of the Zone, Town Development Officer, Inspector and his Deputies and Assistants must be held personally responsible for not reporting IMMEDIATELY any unauthorised construction in the area under their control, and strict action must be taken against such negligent officers. They must be relieved by the Municipal Commissioner of undue pressure of other administrative work and the Commissioner must direct them to visit the area under their control regularly. The public at large may be also informed that they are welcome to bring to the notice of the municipal commissioner any unauthorised construction activities.

###. AMC shall ensure that a notice board is displayed at all construction sites giving complete information such as survey number / F.P. No. of land on which construction is being carried out, names and complete address of owner of the land, builder, structural engineer, designer, clerk of work etc. nature of permission granted and permitted use of cellar, hollow plinth, floors etc. so that the public interested in the property may know the nature of construction and could inform the authorities instantaneously if there is any violation. The Corporation shall strictly enforce this direction.

###. We have discussed in detail about the different stages of construction and issuance of progress certificate. At each stage of progress certificate the officers of the Corporation are required to visit the construction and inspect it prior to granting the progress certificate. In the circumstances, it is difficult to believe that any unauthorised construction would go unnoticed by the officers, and if it has gone unnoticed, it is either negligence or connivance with the builders. In any event, at the stage of granting BU Permission, the entire construction is required to be inspected and compared with the sanctioned plan, and if there is any unauthorised construction, BU Permission is to be refused and the matter is required to be referred to the higher officers. From the large scale illegal constructions in the city, there is no doubt that there is failure on the part of the officers of the Corporation in discharging their duties. However, case pertaining to each building is required to be studied individually vis-a-vis the officers of AMC who were in charge at different stages of the construction before fixing their responsibility. We propose to assign this task to a

three-member Committee headed by a retired High Court Judge, a well known Architect and a Structural Engineer. We direct AMC to suggest to this Court names of ten approved Architects and Engineers within a period of ten days from today whereupon the Court will select and constitute a Committee and fix their terms of working, place of working etc. Thereupon the Corporation shall provide to the Committee a well furnished office room with all facilities including communication facilities. The Corporation shall also provide complete files pertaining to each and every building as may be required by the Committee and the Committee will be thereafter requested to submit its report fixing responsibility stagewise within three months from the date of organising the Committee.

###. We clarify that this exercise is only to fix the responsibility of the negligent officers stage wise, and this direction is not to be construed by AMC that till the Committee submits its report, no action is required to be taken by them to put the premises to its use as per plans or that the Corporation is restrained from taking adequate action. The trial Court shall also proceed with the cases as per the directions given to it and decide the cases in accordance with law, without being influenced by this part of the directions in this order.

###. So far as the contempt notice issued to Shri P.K. Ghosh is concerned, this Court will be passing a separate order later on.

###. Special Civil Application No. 6794 of 1992 stands allowed and rule is made absolute in terms of the directions given hereinabove. No order as to costs.

Special Civil Application No. 6893 of 1992 stands rejected. No order as to costs.

In view of the aforesaid order passed in the main matters, we do not propose to pass any orders in the Civil Applications, and the Civil Applications stands disposed of accordingly.

However, the Registry shall notify this matter before us on 13.10.2000 for compliance with paragraph 109, on 3.11.2000 for compliance with paragraphs 23 and 90, and 1.12.2000 for compliance with paragraph 61 and other directions contained in this order.

( B.C. PATEL, J. )

Per P.B.Majmudar, J.

###.I have gone through the exhaustive and elaborate judgement of my learned Brother B.C. Patel, J. I fully concur with the view expressed by my brother Patel, J. He has considered all the points in detail and issued certain directions for the purpose of enforcing building laws and regulations. However, I would like to add my own views insofar as change of user from residence to commercial use is concerned.

###. It is no doubt true that the Administrator of the Corporation could not have permitted change of user without any express powers conferred by the law. However, by virtue of the aforesaid Resolutions and because of the inaction on the part of the AMC, irreversible position has been created and some innocent occupiers have been duped, since some occupants have already filed Civil Suits and obtained stay, and, therefore, it can be said that they were aware of the situation. It is not possible to ignore the fact that now because of the aforesaid so called Resolutions and permission granted various commercial complexes have been constructed on CG Road in the city of Ahmedabad. In the last many years those innocent occupiers are doing their business.

###. However, while implementing the decision and the directions given by my brother B.C. Patel, J., the Corporation should consider the hardship of the occupants occupying the premises in view of the 1994 resolution, the Corporation may grant sufficient time to such occupiers to restore the premises to the use to which the plans were sanctioned. However, so far as the place reserved for parking is concerned, the Corporation must follow the directions as given by my learned Brother, B.C. Patel, J.

###. So far as rest of the directions regarding parking space, etc. are concerned, I fully agree with the views expressed by my brother Patel, J.

###. With the aforesaid observations, I fu the view expressed by my brother Patel, J.

csm./ (P.B. MAJMUDAR, J. )